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ON CASTLES AND COMMERCE: ZONING LAW AND THE HOME-BUSINESS DILEMMA

NICOLE STELLE GARNETT*

As I write this sentence, I am bouncing my six-month-old daughter on my knee, eating one of those awful cardboard-textured cereal bars, and pondering the best way to explain the difference between springing and shifting executory interests to my first-year property class. I might also be breaking the law.¹

For most people, for most of human history, work and home have been inextricably intertwined. Practically everyone, from the farmer to the city dweller, worked at home.² Houses and apartments were not only dwelling places, but also centers of commercial activity.³ Physicians treated patients and attorneys serviced clients from offices located in their homes; butchers, bakers, and candlestick

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1. The South Bend Zoning Code permits "customary home occupations" in residential zones, a term that is defined to include "author." While I assume that an author of law review articles qualifies, I might run into trouble if a zealous zoning enforcement official believed that (1) an assistant professor of law is not a "customary" home occupation; (2) my personal computer is not "electronic or mechanical equipment . . . customarily associated with domestic use"; or (3) my research assistant is my employee. SOUTHBEND, IND., MUNICIPAL CODE § 21-8(a)(6) (2000), available at http://www.municode.com/CGI-BIN/om_isapi.dll?infobase=11304.NFO&softpage=Browse_Frame_pg42.

2. See NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 24 (2d ed. 1997) (noting that preindustrial economy consisted of subsistence farms and home industries); DOLORES HAYDEN, *THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES* 12-13 (1981) (noting that the vast majority of people in preindustrial America lived and worked on small subsistence farms).

3. See COTT, *supra* note 2, at 24 (noting that prior to 1835, American economy was "household production" based); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 47 (1985) (noting that, in the preindustrial world, "[e]ach household was a business").

makers lived above, below, or behind their shops. Tailors and seamstresses greeted customers in their living rooms and altered clothes in their bedrooms. Blacksmiths and carpenters plied their trades in backyard workshops. Families regularly rented out a room or two to make ends meet. Indeed, the phenomenon of leaving home to *go to work* did not become the norm until the Industrial Revolution created two "separate spheres" of human existence, the domestic and the commercial.⁴

For nearly two centuries, there was every reason to believe that this rearrangement in social organization was going to be, for better or for worse, a permanent one. Today, however, other "revolutions"—social,⁵ economic,⁶ and, especially, technological⁷—are bringing the two spheres together again for millions of Americans. In 1991, the U.S. Census Bureau found that 20 million people, other than farmers, were working at home at least part time.⁸ Four years later, another nationwide survey estimated that the number had climbed to 43.2 million, with 12.7 million people working in home-based businesses and the remainder either telecommuting or bringing work home after hours.⁹ Today, the American Association of Home-Based Businesses estimates that the number of people who work in

4. See, e.g., COTT, *supra* note 2, at 63-74 (describing connection between Industrial Revolution and rise of "separate spheres" ideology); Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-1501 (1983) (same).

5. See *infra* notes 102-22 and accompanying text.

6. See *infra* notes 123-39 and accompanying text.

7. See *infra* notes 140-51 and accompanying text.

8. See Linda N. Edwards & Elizabeth Field-Hendrey, *Home-based Workers: Data from the 1990 Census of Population*, MONTHLY LAB. REV., Nov. 1996, at 26, 27.

9. See Lucie Young, *Home Office Guide: Home Is Where the Hard Work Is*, N.Y. TIMES, Sept. 29, 1994, at C1 (describing Link Associates survey). Link Associates estimated that the number of people working from home would increase to 57 million by 1997. See *id.* A more recent study, conducted for the U.S. Small Business Administration, estimated that 9 million of the 17.3 million small businesses that filed a Schedule C, partnership, or S corporation tax return in 1992, were home based, and that the number of home-based businesses had increased to 10-12 million by 1999. See JOANNE H. PRATT, *HOMEBASED BUSINESS: THE HIDDEN ECONOMY* ES-i, 4 (1999). This number underestimates the number people who work for such enterprises, both because many home-based businesses hire employees, see *id.* at 11, and because estimates based upon tax returns do not include businesses that fail to file tax returns. See, e.g., Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2241 (1994).

home-based business has increased to more than 24 million.¹⁰ Whatever the precise numbers, home businesses are making their mark on the American economy. Phone companies are glutted with requests for new phone lines to service home offices,¹¹ office furniture companies are unveiling new lines of "home-office furniture,"¹² home builders are making home offices standard in all new homes, and contractors report high demand for home renovations to incorporate home offices.¹³ Dozens of how-to books provide guidance on establishing a successful home business,¹⁴ and

10. See *American Association of Home-Based Businesses Home Page*, at <http://www.aahbb.org> (last visited Oct. 19, 2000).

11. See Jonathan Marshall, *Pac Bell Scrambles To Hire Workers*, S.F. CHRON., Jan. 11, 1997, at D1, available in 1997 WL 6689507; Jonathan Marshall, *Pac Bell Will Spend \$2.2 Billion To Meet Huge Demand for Lines*, S.F. CHRON., Apr. 16, 1998, at D1, available in 1998 WL 3911606; Greg Miller, *Typing Up the Phone Companies*, L.A. TIMES, Jan. 21, 1997, at A1. Several of the regional "Baby Bell" telephone companies provide services targeted specifically for home offices and home businesses. See *Pacific Bell, Work at Home*, at http://www.pacbell.com/Products_Services/WorkAtHome10,1217,1,00.html (last visited Oct. 19, 2000); *US West, Small Business, Home Office Solutions*, at <http://www.uswest.com/smallbusiness/products/homeoffice> (last visited Oct. 19, 2000); *Verizon Small Business Home Page*, at <http://www.bellatlantic.com/smallbiz> (last visited Oct. 19, 2000).

12. See, e.g., *@Home 2000 is Here*, at <http://www.office@home.com> (last visited Oct. 19, 2000); *Galvins Business and Home Office Furniture*, at <http://www.galvins.com> (last visited Oct. 19, 2000); *Home Office Direct*, at <http://www.homeofficedirect.com> (last visited Oct. 19, 2000); *Home Office Furniture & Products*, at <http://www.homefurnish.com/homeoffc.htm> (last visited Oct. 19, 2000); *Home Office Store Welcome Page*, at <http://www.thehomeofficestore.com> (last visited Oct. 19, 2000); *Index to Home Office Mall*, at http://www.the-office.com/page_b.htm (last visited Oct. 19, 2000).

13. See, e.g., Cheryl Currid, *Whether Corporate or Solo, Home-Office Numbers Rising*, HOUS. CHRON., Sept. 17, 1999, at 3, available in 1999 WL 24253904; Bryan Meyer, *SOHO-Bound, Small Office/Home Office Trend Earning Respect*, CHI. TRIB., Dec. 5, 1999, at C3, available in 1999 WL 2938715; Diane Stafford, *When It Comes to Offices . . . There's No Place Like Home*, KAN. CITY STAR, May 17, 1997, at B1, available in 1997 WL 3013794 (discussing home-business-support industries); Jeffrey Steele, *It's Workable; Add a Home Office While Saving Your Nest Egg*, CHI. TRIB., May 16, 2000, at C1, available in 2000 WL 3665624.

14. See, e.g., LYNIE ARDEN, *THE WORK-AT-HOME SOURCEBOOK* (6th ed. 1996); JANET ATTARD, *THE HOME OFFICE AND SMALL BUSINESS ANSWER BOOK* (1993); JEFF BERNER, *THE JOY OF WORKING FROM HOME: MAKING A LIFE WHILE MAKING A LIVING* (1994); BARBARA BRABEC, *HOMEMADE MONEY: HOW TO SELECT, START, MANAGE, MARKET AND MULTIPLY THE PROFITS OF A BUSINESS AT HOME* (5th ed. 1997); ALICE BREDIN, *THE VIRTUAL OFFICE SURVIVAL HANDBOOK: WHAT TELECOMMUTERS AND ENTREPRENEURS NEED TO SUCCEED IN TODAY'S NONTRADITIONAL WORKPLACE* (1996); KAREN CHENEY & LESLIE ALDERMAN, *HOW TO START A SUCCESSFUL HOME BUSINESS* (1997); PATRICK COCHRANE, *THE KITCHEN TABLE MILLIONAIRE: HOME-BASED MONEY-MAKING STRATEGIES TO BUILD FINANCIAL INDEPENDENCE TODAY* (1997); PAUL EDWARDS & SARAH EDWARDS, *MAKING MONEY WITH YOUR COMPUTER AT HOME* (1993) [hereinafter EDWARDS & EDWARDS, *MAKING MONEY*]; PAUL EDWARDS & SARAH

a number of magazines and Internet websites focus on the concerns of home-based entrepreneurs and telecommuters.¹⁵ And, true to Alexis de Tocqueville's observation that Americans are joiners,¹⁶ a number of private home business associations have formed to serve as clearinghouses for resources and information, to obtain discount group insurance rates, to hold conventions, and, importantly, to lobby for favorable changes in the law.¹⁷ And with good reason: individuals who want to work at home face significant legal

EDWARDS, *THE BEST HOME BUSINESSES FOR THE 21ST CENTURY: THE INSIDE INFORMATION YOU NEED TO KNOW TO SELECT A HOME-BASED BUSINESS THAT'S RIGHT FOR YOU* (3d ed. 1999); PAUL EDWARDS & SARAH EDWARDS, *WORKING FROM HOME: EVERYTHING YOU NEED TO KNOW ABOUT LIVING AND WORKING UNDER THE SAME ROOF* (1994) [hereinafter EDWARDS & EDWARDS, *WORKING FROM HOME*]; GWEN ELLIS, *101 WAYS TO MAKE MONEY AT HOME* (1996); DAVID R. EYLER, *THE HOME BUSINESS BIBLE: EVERYTHING YOU NEED TO KNOW TO START AND RUN YOUR SUCCESSFUL HOME-BASED BUSINESS* (1994); LIZ FOLGER, *THE STAY-AT-HOME MOM'S GUIDE TO MAKING MONEY: HOW TO CREATE THE BUSINESS THAT'S RIGHT FOR YOU USING THE SKILLS AND INTERESTS YOU ALREADY HAVE* (1997); KIM T. GORDON, *BRINGING HOME THE BUSINESS: THE 30 TRUTHS EVERY HOME BUSINESS OWNER MUST KNOW* (2000); LISA KANAREK, *101 HOME OFFICE SUCCESS SECRETS* (1994); MICHAEL LeBOEUF, *THE PERFECT BUSINESS: HOW TO MAKE A MILLION FROM HOME WITH NO PAYROLL, NO EMPLOYEE HEADACHES, NO DEBTS, AND NO SLEEPLESS NIGHTS!* (1997); ELLEN H. PARLAPIANO & PATRICIA COBE, *MOMPREENURS: A MOTHER'S PRACTICAL STEP-BY-STEP GUIDE TO WORK-AT-HOME SUCCESS* (1996); CAMERON PARTOW & DONNA PARTOW, *HOW TO WORK WITH THE ONE YOU LOVE AND LIVE TO TELL ABOUT IT* (1995); LISA M. ROBERTS, *HOW TO RAISE A FAMILY & A CAREER UNDER ONE ROOF: A PARENT'S GUIDE TO HOME BUSINESS* (1997); DEBRA SCHEPP & BRAD SCHEPP, *THE TELECOMMUTER'S HANDBOOK: HOW TO EARN A LIVING WITHOUT GOING TO THE OFFICE* (2d ed. 1995); BARBARA WELTMAN, *THE COMPLETE IDIOT'S GUIDE TO STARTING A HOME-BASED BUSINESS* (2000).

15. See, e.g., BIZTALK; HOME BUSINESS JOURNAL; HOME BUSINESS MAGAZINE; HOME OFFICE COMPUTING; INCOME OPPORTUNITIES; WEALTH BUILDING; WORKING AT HOME MAGAZINE; *Business at Home*, at http://www.gohome.com/content_index.html (last visited Oct. 19, 2000); *Home Office Association of America*, at <http://www.hoaa.com/main.htm> (last visited Oct. 19, 2000); *Homeworking Jobs, Homeworking Opportunities, Homeworking Information*, at <http://www.homeworking.com> (last visited Oct. 19, 2000); *Independent Homeworkers Alliance*, at <http://www.homeworkers.org/DefaultA.htm> (last visited Oct. 19, 2000); *ITAC International Telework Association and Council*, at <http://www.telecommute.org/body.html> (last visited Oct. 19, 2000); *OutSource 2000*, at <http://www.outsource2000.org/index2.php3?id908596093> (last visited Oct. 19, 2000); *Small Office Home Office Knowledge Center*, at <http://www.so-ho.org> (last visited Oct. 19, 2000).

16. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191 (Phillips Bradley ed., 1945) ("In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America.").

17. See Jeffery D. Zbar, *Back Porch Network; Associations Help Home-Based Workers Learn and Build Their Businesses*, FT. LAUDERDALE SUN-SENTINEL, May 19, 1997, § 1, at 3, available in 1997 WL 3104499; see also *supra* note 10; *Home Office Association of America*, at <http://www.hoaa.com/main.htm> (last visited Oct. 19, 2000); *Welcome to Home Business Works*, at <http://www.homebusinessworks.com> (last visited Oct. 19, 2000).

obstacles, especially municipal zoning laws that severely restrict the operation of home businesses when they do not prohibit them outright.¹⁸

Home businesses present a particularly vexing dilemma for local zoning officials. On the one hand, cultural indicators suggest that many Americans perceive the opportunity to work at home as a good thing, perhaps a necessity in some cases. For example, stories of the millions of people doing so are championed by reporters writing human interest "pulse-of-the-nation" articles in major newspapers and magazines.¹⁹ On the other hand, the "home business" is, at a basic level, an affront to a core, foundational

18. See ROBERT M. ANDERSON & KENNETH H. YOUNG, *ANDERSON'S AMERICAN LAW OF ZONING* §§ 13.01-.26 (4th ed. 1996). Zoning rules are not the only legal barriers faced by home businesses. See, e.g., *International Ladies' Garment Workers' Union v. Dole*, 729 F. Supp. 877 (1989) (concerning application of Fair Labor Standards Act to home-based piecework knitters); Katharine N. Rosenberry, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, 31 J. MARSHALL L. REV. 443 (1998) (discussing enforcement of restrictive covenants against home businesses); Brenda A. Ray, Note, *Home Office Deduction in Need of Repair: Applying Mixed-Use Allocation Theory to Internal Revenue Code Section 280A(c)*, 60 OHIO ST. L.J. 199 (1999) (arguing that federal tax rules disadvantage home businesses); Frank Swoboda, *OSHA Exempts Home Offices; Firms Liable Only On Industrial Jobs*, WASH. POST, Jan. 27, 2000, at A1 (discussing OSHA's decision to withdraw the above regulation); Jonathan Yardley, *Big Brother Makes a House Call*, WASH. POST, Jan. 10, 2000, at C2 (discussing application of OSHA regulations to work-at-home conditions).

19. See, e.g., Kathryn Balint, *She's Right at Home and On the Job; Telecommuter Loves the Comfort, the Convenience, and the 10-second Commute*, SAN DIEGO UNION-TRIB., May 9, 2000, at 6, available in 2000 WL 13963778; Maryanne Murray Buechner, *Superconnected; In the Fast-Moving Digital Economy, Networks Matter More than Ever, for Computers and People. Here's How to Turn Your Home into an Electronic Nerve Center and Keep Job-Seeking Skills Honed*, TIME, Mar. 22, 1999, at 114A, available in LEXIS, News Library, Time File; Chris Cobbs, *Home Work Lessons: As Technology Soars and Many People Flee from Downtown Areas, Telecommuting Becomes a More Common Aspect of Work Life*, ORLANDO SENTINEL, July 9, 2000, at G1, available in 2000 WL 3612810; Dave Gussow, *When Home Becomes Office*, ST. PETERSBURG TIMES, Mar. 20, 2000, at 10E, available in LEXIS, News Library, St. Petersburg Times File; Dave Johnson, *Sent Home to Success*, HOME OFFICE COMPUTING, June 2000, at 50, available at http://www.findarticles.com/cf_1/m1563/b_18/63636591/print.jhtml; Carri Karuhn, *Making At-Home Businesses Work; Entrepreneurs Encounter Obstacles, Encouragements from Community Officials*, CHI. TRIB., June 10, 1998, at Metro 1, available in 1998 WL 2865124; Nancy Kelleher, *Punch the Clock; Feed the Kids; Stay-at-Home Workers Set Own Schedules*, BOSTON HERALD, Apr. 4, 1999, at 055, available in 1999 WL 3394515; Maria Mallory, *Balancing Business and Baby; More Women are Embracing Work at Home Instead of Choosing Between Kids and Careers*, ATLANTA J.-CONST., June 25, 2000, at R1, available in 2000 WL 5463439; Wilma Randle, *Under One Roof; The Ranks of Those Who Combine Home and Business Are Still Growing*, CHI. TRIB., July 27, 1997, at 5M, available in 1997 WL 3572081; Young, *supra* note 9, at C1.

principle of American zoning laws—the idea that “home” and “work” are incompatible, that the “home” should be carefully segregated into exclusively residential, commerce-free zones.²⁰ While the issue has attracted little scholarly attention in recent years,²¹ all indications suggest that local officials increasingly will find it difficult to avoid confronting the continued viability of zoning proscriptions against working at home. Efforts to enforce zoning rules against home businesses have generated a number of judicial decisions in recent years,²² and reports of enforcement actions against home businesses in the popular press suggest that these cases may represent only the tip of the iceberg.²³ Furthermore, a

20. See ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 4 (1987) (noting that suburban ideal is based in part on the exclusion of work from the home); see also CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 116 (1977) (discussing the importance of the “distinction between social reproduction (the family) and industrial production (the firm)” in American land use law); *infra* notes 49-69 and accompanying text (discussing private sphere ideology).

21. Apparently, treatment of the issue has, thus far, been concentrated in the popular and trade press. See, e.g., Julie Bennett, *Home Bodies*, *PLANNING*, May 1, 1999, at 10.

22. See, e.g., *Thomas v. City of Phoenix*, 828 P.2d 1210 (Ariz. Ct. App. 1991) (concerning city citation for operating a cake-decorating business from their home); *Bach v. County of Butte*, 263 Cal. Rptr. 565 (Ct. App. 1989) (concerning appeal from order enjoining defendant from operating home business); *Conetta v. Zoning Bd.*, No. CV 940136409, 1995 Conn. Super. LEXIS 121, at *1 (Conn. Super. Ct. Jan. 12, 1995) (concerning city's finding that home-plumbing business violated zoning law), *rev'd*, 677 A.2d 987 (Conn. App. Ct. 1996); *Gilmore v. County of DuPage*, 567 N.E.2d 1111, 1112 (Ill. App. Ct. 1991) (enjoining defendant from operating a chiropractor's office); *City of Wapello v. Chaplin*, 507 N.W.2d 187 (Iowa Ct. App. 1993) (enjoining defendants from operating towing service); *City of New Orleans v. Miller*, 612 So. 2d 222 (La. Ct. App. 1992) (concerning injunction sought by city barring artist from using an automatic air compressor in home studio), *rev'd*, 614 So. 2d 1248 (La. 1993); *Levinson v. Montgomery County*, 620 A.2d 961 (Md. 1993) (upholding order against ophthalmologist to cease operating optical dispensary in basement of home); *St. Louis v. Kienzle*, 844 S.W.2d 118 (Mo. Ct. App. 1992) (enjoining insurance agent from working out of home); *Doersam v. City of Gahanna*, No. 96APF12-1766, 1997 Ohio App. LEXIS 4468 (Ohio Ct. App. Sept. 30, 1997) (concerning situation where water department official discovered resident was selling insurance out of his home); *Cozzens v. Banky*, No. 90-G-1568, 1991 Ohio App. LEXIS 2676 (Ohio Ct. App. June 7, 1991) (concerning appeal from order enjoining defendants from operating roofing business from their home); *City of Avon v. Samanich*, No. C.A. No. 95CA006042, 1995 Ohio App. LEXIS 3455, at *1 (Ohio Ct. App. Aug. 23, 1995) (enjoining defendant's preschool).

23. See, e.g., Sarah Cooke, *Town Seeks Limits on Rummage Sales*, *MILWAUKEE J.-SENT.*, Feb. 21, 1999, at 5, available in 1999 WL 7662213 (noting 14 home business zoning violations reported in Richfield in 1998); Roger Croteau, *San Marcos' KIND Marks First Anniversary*, *SAN ANTONIO EXPRESS-NEWS*, Mar. 26, 1998, at 1B, available in 1998 WL 5085109 (reporting that city tried to shut down radio station as illegal home business); Dan Danbom, *The REAL Home Office OK, You Try Working in Sweats—Unshaven, Unshowered*, *DENVER POST*, Feb.

number of jurisdictions already have undertaken a review of the zoning laws governing home businesses—often after increasing numbers of home businesses forced the issue upon them.²⁴

In this Article, I argue that local officials should not shy away from tackling the home-business dilemma.²⁵ There are strong

2, 1997, at H17, available in 1997 WL 6063984 (mentioning zoning restrictions on home business); David Harpster, *County Cuts Rules on Home Business*, SAN DIEGO UNION-TRIB., July 18, 1996, at B3, available in 1996 WL 2170360 (reporting citation of CPA by code enforcement officer for employing a part-time clerk at her house); Courtney Price, *Zoning Rules Keep Home Businesses on Straight Path*, ROCKY MTN. NEWS, Aug. 5, 1996, at 2B, available in 1996 WL 7582773 (stating that zoning enforcement is complaint driven).

24. See, e.g., Liz Atwood, *Planners Move to Update Home Business Law; Rules Seek to Balance Work, Community Needs*, BALT. SUN, Feb. 20, 1998, at 3B, available in 1998 WL 4952834; Damon Cline, *Work at Home Simplified*, AUGUSTA CHRON., May 1, 1998, at O28, available in 1998 WL 27119673; Tim Evans, *Some Home Businesses Get All Clear; The Smallest Need No Permits, But Larger Ones Will Face Regulation to Protect Neighborhoods*, INDIANAPOLIS STAR, Aug. 19, 1998, at W3, available in LEXIS, News Library, Indianapolis Star File; James Flanigan, *The Next Mayor Will Need to Capitalize on Ideas*, L.A. TIMES, Apr. 25, 1993, at D1; David Harpster, *County Cuts Rules on Home Business*, SAN DIEGO UNION-TRIB., July 18, 1996, at B3, available in 1996 WL 2170360; Hugo Martin, *City Council Backs Home Businesses*, L.A. TIMES, July 11, 1996, at B1; Bob Merruifield, *Zoning Law Now Covers Businesses in Homes*, CHI. TRIB., Mar. 19, 1999, at Metro 2, available in 1998 WL 2855036; *Rules for Business in Homes Ok'd*, CHAPEL HILL HERALD, Nov. 28, 1996, at 2, available in LEXIS, News Library, News Group File; Jacqueline Seibel, *Richfield Board Updates Home-Business Regulations*, MILWAUKEE J.-SENT., Aug. 27, 1998, at Neighbors 2, available in 1998 WL 14031698.

25. Much has been said about zoning law over the years. For a few of the many dozens of books written on the subject, see, for example, RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985); WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); MARTIN A. GARRETT, JR., *LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS* (1987); DANIEL R. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* (1971); RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY* (1996); ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar & Jerold S. Kayden eds., 1989). Indeed, so much has been said about zoning that there is a certain danger in attempting to enter the fray, even to write about an isolated issue such as its regulation of home businesses. One could not possibly begin to give credit to everyone who has contributed insight to the rich scholarly literature on zoning that may be relevant to my narrow topic. See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 60 (1993) ("Writing about zoning in the 1990s, then, raises the question of what a person can productively add to the topic."). With humility, therefore, I include a disclaimer: Although much of what I say in this Article may have implications beyond the narrow issue that I intend to address, it is not my intention to set forth a grand theory of land use regulation, but only to discuss how a tiny part of it might be amended to better accommodate the modern economic and social realities that lead people to work from home.

reasons to reconsider zoning restrictions on working from home: not only are many millions of people already violating zoning laws by working from home,²⁶ but technological advances are making it easier for more to do so every day.²⁷ Furthermore, working at home is often a viable solution to the dilemmas faced by parents struggling to balance work and family,²⁸ could enable low-income individuals to achieve economic self-sufficiency,²⁹ and might help alleviate the social and environmental problems caused by suburban sprawl.³⁰

That is not to say that local officials should ignore residents' legitimate concerns about home businesses' potential to significantly disrupt their neighbors' lives. Rather, I argue that current zoning law's segregation of "work" from "home" is based in part upon the outdated belief that "working" and "residing" are incompatible. As a result, while current rules simply exclude most home businesses from residential zones as a matter of course, I urge local legislatures to consider amending zoning laws to instead target residents' legitimate concerns about home businesses, namely their potential to generate negative externalities and to undermine neighborhood character. I conclude with a brief discussion of possible ways that local officials might accomplish this difficult task.

I. THE HISTORICAL AND IDEOLOGICAL FOUNDATIONS OF ZONING RESTRICTIONS ON WORKING FROM HOME

The history of American zoning laws has been amply recounted elsewhere.³¹ Thus, I will not repeat others' descriptions of the economic, ideological, demographic, and political forces that led to the near-universal adoption of that peculiarly American institution

26. See *infra* notes 181-89 and accompanying text.

27. See *infra* notes 142-53 and accompanying text.

28. See *infra* notes 105-24 and accompanying text.

29. See *infra* notes 125-41 and accompanying text.

30. See *infra* notes 154-80 and accompanying text.

31. See, e.g., S.J. MAKIELSKI, JR., *THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE* (1966) (analyzing zoning in New York City from 1916 to 1960); SEYMOUR I. TOLL, *ZONED AMERICAN* (1969) (detailing the history of zoning in America).

called zoning.³² However, in order to understand how zoning laws came to exclude almost all commerce, including home businesses, from residential neighborhoods, it helps to know a bit about one ideological thread that weaves through the fabric of American zoning laws. It is on that thread—the primacy of the home as “haven” from the world³³—that I focus in the following discussion.

A. “Separate Spheres” of Work and Home

For most of human history, the idea that a “home” could also be a center of productive activity was hardly an aberrant one. On the contrary, “[e]ach household was a business.”³⁴ The phenomenon of leaving “home” to go to “work” became commonplace only after the Industrial Revolution changed the rhythm of daily life.³⁵ Historians described how the physical separation of work and home affected societal views of the home (and, importantly, of women within the home), culminating in the long-enduring ideology of “separate spheres.”³⁶ In 1795, for example, when Martha Moore Ballard wrote “a woman’s work is never done,” she was referring not simply to her

32. See, e.g., PLATT, *supra* note 25, at 215 (“Although it originated in Germany in the late 19th century, zoning is a quintessentially American institution with the blend of idealism and greed which that implies.”).

33. See *supra* note 20 and accompanying text.

34. JACKSON, *supra* note 3, at 47.

35. See, e.g., *id.*

36. See, e.g., DOLORES HAYDEN, *REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK AND FAMILY LIFE* 67-74 (1984) (discussing the role of women in the isolated domestic sphere through various feminist strategies); WALTER E. HOUGHTON, *THE VICTORIAN FRAME OF MIND, 1830-1870*, at 341-48 (1957) (discussing the home and family as the center of Victorian life); JACKSON, *supra* note 3, at 48-49 (describing the Victorian idealization of the home as the bastion of virtue and women’s duty to maintain it); GWENDOLYN WRIGHT, *BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA* 76-79 (1981) (noting that “the woman was responsible for perfecting an alternative to the commercial world where her husband and sons had to work” and describing the characteristics of the ideal home); Kirk Jeffrey, *The Family as Utopian Retreat from the City: The Nineteenth-Century Contribution*, *SOUNDINGS*, Spring 1972, at 21, 22-39 (discussing the cultural foundations behind the middle-class’s idealization of the family as retreat from urbanization); Olsen, *supra* note 4 (discussing the dichotomy between market and family as limiting the effectiveness of equal treatment reform); Reva B. Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073, 1092-94 (1994) (recognizing the development of a strict division between the “spheres”). See generally COTT, *supra* note 2 (providing an historical overview of the separate “woman’s sphere” in Victorian New England).

domestic duties as wife and mother; to the contrary, the sixty-year-old matron of a working farm also contributed to her household's finances by serving as a trusted midwife throughout her community and by manufacturing and selling domestic crafts to her neighbors.³⁷ By the middle of the nineteenth century, however, the long-enduring ideal of a wife like Ballard, whose industrious spirit caused biblical poets to call her "blessed,"³⁸ had given way to hazy Victorian images of the cloistered nurturer who shunned the world for domestic pursuits.³⁹ Work, at least work for pecuniary gain, came to be seen not as a virtue but as a "contagion."⁴⁰

Through the transformation from preindustrial to modern economic organization, men left home for work, and commerce and industry left with them.⁴¹ Long the productive building block of society, the home became the rarified "domestic sphere,"⁴² which stood in sharp contrast to the grueling, cutthroat "world."⁴³ The

37. See COTT, *supra* note 2, at 19.

38.

A good wife who can find? She is far more precious than jewels. . . . She seeks wool and flax, and works with willing hands. . . . She considers a field and buys it; with the fruit of her hands she plants a vineyard. . . . She perceives that her merchandise is profitable. . . . She makes linen garments and sells them; she delivers girdles to the merchant. Strength and dignity are her clothing, and she laughs at the time to come. . . . Her children rise up and call her blessed; her husband also, and he praises her: "Many women have done excellently, but you surpass them all."

Proverbs 31 (Revised Standard Version).

39. See COTT, *supra* note 2, at 69-70 (describing the ideal Victorian wife).

40. Sarah Josepha Hale, the editor of *Godey's Lady's Book*, declared in 1832: "Our men are sufficiently money-making. Let us keep our women and children from the contagion as long as possible." COTT, *supra* note 2, at 68; see HAYDEN, *supra* note 2, at 13.

41. For discussion of the separation of men's work from the private sphere, see, for example, COTT, *supra* note 2, at 59-62; Jeffery, *supra* note 36, at 29; Olsen, *supra* note 4, at 1499.

42. See, e.g., COTT, *supra* note 2, at 63-74 (describing domesticity); see also Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (discussing development of the woman's sphere); Siegal, *supra* note 36, at 1093 ("The so-called 'cult of domesticity' that developed in the early decades of the nineteenth century depicted the economic developments of the era in exaggerated, gender-conscious form. In popular discourse, family and market appeared as two distinct spheres. . . . The market was a male sphere of competitive self-seeking, while the home was celebrated as a female sphere, a site of spiritual uplift that offered relief from the vicissitudes of market struggle.").

43. See COTT, *supra* note 2, at 64 (arguing that "[t]he central convention of domesticity was the contrast between the home and the world").

idealized home became commerce-free;⁴⁴ it was "both a shelter *from* the anxieties of modern life . . . and a shelter *for* those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy."⁴⁵ The home was seen as an oasis, a place where women and children were shielded from the dangers of competitive modern economic forces,⁴⁶ and, importantly, a place of respite for a weary husband returning from work each night.⁴⁷ As a New Hampshire minister urged in 1827,

It is at home, where man . . . seeks a refuge from the vexations and embarrassments of business, an enchanting repose from exertion, a relaxation from care by the interchange of affection: where some of his finest sympathies, tastes, and moral and religious feelings are formed and nourished;—where is the treasury of pure disinterested love, such as is seldom found in the busy walks of a selfish and calculating world.⁴⁸

B. The Rise of Commerce-Free Zones

Not surprisingly, especially given the legitimate health and safety threats posed by rapidly industrializing cities, these sentiments led inevitably to the desire to put miles between the two spheres:⁴⁹ how could the home serve as a true sanctuary unless it was physically set apart from the realities of the urban work-a-day

44. See HOUGHTON, *supra* note 36, at 341-47 (describing how the Victorian home was idealized as a respite from the business world). *But cf.* COTT, *supra* note 2, at 70 (noting that many Victorian-Era women brought commerce into the home by engaging in the "given-out" system of production).

45. HOUGHTON, *supra* note 36, at 343.

46. See COTT, *supra* note 2, at 67-70.

47. See WRIGHT, *supra* note 36, at 109 ("The widely held expectation that the impersonal market was grueling and cutthroat, harshly competitive and draining, posed the home as compensation. '[T]his stirring career away from home,' wrote one contented husband, 'renders home to him so necessary as a place of repose, where he may take off his armor, relax his strained attention, and surrender himself to perfect rest.'").

48. COTT, *supra* note 2, at 64 (alteration in original); *see also* JACKSON, *supra* note 3, at 48 (quoting Reverend William G. Eliot, Jr.'s 1853 sermon to a female audience: "The foundation of our free institutions is in our love, as a people, for our homes. The strength of our country is found, not in the declaration that all men are free and equal, but in the quiet influence of the fireside, the bonds which unite together in the family circle. The corner-stone of our republic is the hearth-stone").

49. See JACKSON, *supra* note 3, at 69-72; WRIGHT, *supra* note 36, at 73-89, 96-113.

world? Kenneth Jackson's insightful history of the American suburbs chronicles the ties between the development—and especially the promotion—of early suburbs and the separate-spheres ideology.⁵⁰ He notes, for example, that while earlier peripheral cities self-consciously patterned themselves after their compact urban neighbors, late-nineteenth-century “suburbs” featured detached, single-family homes set in a semi-pastoral setting.⁵¹

The single-family dwelling came to embody the domestic sphere, and the isolated suburban household became the American ideal. Boosters touted this model of development as the perfect family environment—a true sanctuary purged of the chaos, filth, and degradation associated with the industrial cities.⁵² As Jackson observes, “[t]he suburban ideal offered the promise of . . . retreat from commercialism and industry,” and every suburban home—from the Victorian mansion to the working man's cottage—“seemed immune to the dislocations of an industrializing society and cut off from the toil and turbulence of emerging immigrant ghettos.”⁵³ Thus, one advertisement for a new suburban development featured “Lady Justice” promising an industrious working man a home on an inexpensive payment plan: pointing to a tidy suburban cottage, she proclaimed, “Where All Was Darkness, Now Is Light.”⁵⁴

Thanks to abundant land, increasingly efficient transportation, and the development of cheaper construction methods (especially the “balloon frame” house),⁵⁵ dreams of the “ruralizing of *all* our urban population” shared by suburban visionaries such as Fredrick Jackson Olmstead and Andrew Jackson Downing had begun to be realized by the early twentieth century.⁵⁶ As suburban houses

50. See JACKSON, *supra* note 3, at 45-72; see also FISHMAN, *supra* note 20, at 117-33 (discussing development of early American suburbs); Jeffrey, *supra* note 36, at 25-29 (discussing the development of the “middle-class cult of the rural home”).

51. See JACKSON, *supra* note 3, at 46, 56-57.

52. See WRIGHT, *supra* note 36, at 107-09.

53. JACKSON, *supra* note 3, at 71-72; see also FISHMAN, *supra* note 20, at 4 (“From its origins, the suburban world . . . was based on the principle of exclusion. Work was excluded from the family residence; middle-class villas were segregated from working-class housing; the greenery of suburbia stood in contrast to a gray, polluted urban environment.”).

54. WRIGHT, *supra* note 36, at 97.

55. See JACKSON, *supra* note 3, at 122-37 (discussing the development of middle-class suburbs).

56. FISHMAN, *supra* note 20, at 129 (quoting Olmstead on desire to “ruralize” all of the

became more affordable, more "common men" could afford to live in them. The suburban "ideal" was becoming a reality for larger numbers of American families by the time that zoning exploded onto the American scene in the 1920s.⁵⁷

The reformers responsible for the remarkable legislative phenomenon of American zoning⁵⁸ were undoubtedly driven by a complex set of motives, ranging from a Progressive-Era faith in "scientific government"⁵⁹ to revulsion at the condition of immigrant workers' tenements (combined perhaps with an ugly dose of nativism).⁶⁰ As others have observed, however, evidence of their desire to legislate the suburban ideal by shielding the talismanic "home" from the degradations and disruptions of commerce and industry is unmistakably present, both in their own writings⁶¹ and,

American population); see also JACKSON, *supra* note 3, at 117 (noting that "it had . . . been the dream of Andrew Jackson Downing in the 1840s to resettle 'honest workingmen' in the distant open spaces").

57. See JACKSON, *supra* note 3, at 136 ("For the first time in the history of the world, middle-class families in the late nineteenth century could reasonably expect to buy a detached home on an accessible lot in a safe and sanitary environment."); WRIGHT, *supra* note 36, at 99-106 (discussing the availability of affordable suburban homes in the early twentieth century).

58. See TOLL, *supra* note 31, at 187 (noting that within one year of New York enacting the first zoning law in 1916, 20 cities had followed suit; thousands more did so in the following decade); see also Newman F. Baker, *Zoning Legislation*, 11 CORNELL L.Q. 164, 169 (1926) (noting the "remarkable growth" of zoning and observing that "[i]n spite of the fact that it is recent it is no longer an experiment").

59. See PLATT, *supra* note 25, at 228-33; see also TOLL, *supra* note 31, at 57 (noting that many of the reformers were "internal immigrants" who had moved from the country to the city and who viewed the rural life as an antidote to the harsh realities of the postindustrial world).

60. See, e.g., FISHMAN, *supra* note 20, at 4 (discussing the influx of immigrants and "cheap tenements and boarding houses" that led to the development of suburbia); JACKSON, *supra* note 3, at 20-25 (describing class segregation inside and outside major metropolitan areas); Baker, *supra* note 58, at 164-65 (discussing the need for zoning and drawing connection between the fact that "a large part of the foreign element in our population drifts to the cities" to the rise of congested "foreign quarters" that "breed vice and crime").

61. See WRIGHT, *supra* note 36, at 194 (discussing the "exclusionary" motivations of zoning reformers); Bruno Lasker, *Unwalled Towns*, 43 THE SURVEY 675, 677 (1920) (condemning the class division perpetrated by segregating residences of lower-socioeconomic populations into industrialized cities and wealthier populations into suburban towns); Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 413-18 (1994) (observing that one motivation of zoning advocates was to maintain the separation of the public and private spheres). See generally Charles H. Cheney, *Removing Social Barriers by Zoning*, 44 THE SURVEY 275 (1920)

especially, in judicial decisions considering constitutional challenges to the first zoning ordinances.⁶²

In the decade before the United States Supreme Court upheld comprehensive zoning laws,⁶³ dozens of state courts had occasion to pass upon their constitutionality.⁶⁴ While the state courts divided sharply,⁶⁵ opinions approving the laws frequently contained echoes of the Victorian-Era "separate spheres" ideology. The California Supreme Court held, for example, that

residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. . . . The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole.⁶⁶

The physical separation of work and home, through the segregation of homes into "exclusively residential" districts, was therefore a desirable development in the law, because, in the words of the New York Court of Appeals, "[t]he primary purpose of such a district is safe, healthful, and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits."⁶⁷ The Wisconsin Supreme Court held that "[t]he home seeker shuns a section of a city devoted to industrialism A common and natural instinct directs him to a section far removed from commerce, trade, and industry."⁶⁸ And the Maryland Supreme

(promoting exclusively residential zones, especially single-family neighborhoods); Robert H. Whitten, *The Zoning of Residence Sections*, 10 PROC. NAT'L CONFERENCE ON CITY PLAN. 34 (1918) (observing that "[r]esidence districts must . . . be protected against invasion by trade and industry" and proposing methods of zoning).

62. See Lees, *supra* note 61, at 413-18, 428-33.

63. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

64. See *id.* at 369-70 (collecting cases in appellant's argument).

65. See *id.*

66. *Miller v. Board of Pub. Works*, 234 P. 381, 386-87 (Cal. 1925); see also *Fourcade v. San Francisco*, 238 P. 934, 937 (Cal. 1925) ("The basis of the rule there announced [in *Miller*] is the reasonable and necessary protection of the general uniform home districts from the encroachment of foreign and discordant uses, which would ultimately destroy such districts.").

67. *Wulfsohn v. Burden*, 150 N.E. 120, 123 (N.Y. 1925).

68. *State ex rel. Carter v. Harper*, 196 N.W. 451, 455 (Wis. 1923).

Court observed: "[H]owever it may be analyzed, there is a widespread dislike of having business uses invade residential districts The fact is that the conceptions of the people as to the comfortable and desirable mode of living have been changing."⁶⁹

II. ZONING RESTRICTIONS ON "HOME OCCUPATIONS" IN A NUTSHELL

The triumph of the ideology reflected in these opinions endures to this day in the zoning laws that are a universal fact of life in the United States.⁷⁰ Although land use is perhaps the quintessential local responsibility,⁷¹ most zoning codes have, since their inception, organized land uses in a consistent way, predetermining the use of all private land by dividing a community into "zones" where different land uses are permitted.⁷² As the literature on exclusionary zoning vividly illustrates, the system of regulation that results establishes a hierarchy of uses, at the pinnacle of which sit residential zones, especially those reserved for single-family

69. *Goldman v. Crowther*, 128 A. 50, 62 (Md. 1925).

70. See PERIN, *supra* note 20, at 116-18 (discussing the exclusion of commercial uses from suburban neighborhoods by zoning laws); see also Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081-85 (1996) (arguing that the desire to legislate the "pastoral ideal" pervades zoning laws). This ideology is also reflected in Justice Douglas's oft-quoted opinion in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974):

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . .

The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

71. See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) ("[E]ducation and zoning are the principal operations of local governments. . . . Land use control is the most important local regulatory power."); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 92-94 (1999) (discussing the dominant role of local government in land use issues).

72. See PLATT, *supra* note 25, at 235-40 (describing typical zoning schemes); cf. Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 69 (1998) ("[L]and use regulation remains a patchwork of discrete state and federal laws and policies on use and development.").

homes.⁷³ Zoning's highest purpose is, in a sense, to "purify" these zones by prohibiting "incompatible" uses of property within them.⁷⁴

If zoning law aims to purge residential zones of incompatible commercial activities, what are local officials to do about the unavoidable fact that many people will, at least from time to time, work at home? This is an old question. Drafters of early zoning codes had to contend with the fact that home occupations remained quite prevalent well into the twentieth century. As a result, most early codes did not prohibit working from home altogether, but rather permitted either "accessory uses" of residential property, "customary" home occupations, or both.⁷⁵ Many modern codes still contain these types of provisions.⁷⁶ Whether a given use of a home is permitted under these exceptions to municipal zoning codes has been the subject of a great deal of litigation, with courts tending to

73. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 369-70 (1990) (discussing exclusion of commercial enterprises as integral to suburban land use policy); Frug, *supra* note 70, at 1081-89 (reviewing literature); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1685-89 (1979) (arguing that exclusionary zoning is motivated by desire to protect tax base); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) (applying equal protection doctrines for exclusionary zoning laws); Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 811-15 (1991) (criticizing the decision of some communities to exclude both multifamily residences and commercial enterprises).

74. See, e.g., PLATT, *supra* note 25, at 235-36 (describing primacy of excluding incompatible uses from residential zones); Kosman, *supra* note 25, at 79 ("[B]y placing the various districts within a hierarchy to protect some districts from less desirable uses more fully, zoning protected those districts deemed worthy of added protection. The districts most in need of protection were those that contained single-family detached dwellings, perceived as the cornerstone of American society and values. The sociological and moral importance of these dwellings warranted their preferential treatment and maximum protection from harmful, non-conforming uses." (footnotes omitted)).

75. See ANDERSON & YOUNG, *supra* note 18, § 13.01.

76. See *id.* § 13.02; see, e.g., REDONDO BEACH, CAL., ZONING ORDINANCE § 10-2.402 (a)(5) (1996) ("Accessory use shall mean a use incidental, related, appropriate, and clearly subordinate to the main use."), available at <http://www.redondo.org/planning/z1-1.htm#sec402>; CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.01(b) (2000) (defining accessory use as "one which is clearly incidental to or customarily found in connection with, and . . . on the same lot as the principle use of the premises"), available at <http://www.ci.corpus-christi.tx.us/services/planning/zoneindex.html>; FORT WORTH, TEX., ZONING ORDINANCE § 9.1.02 (1999) (defining accessory use as "clearly incidental to the use of the principal building or the primary use of the property and which is located on the same premises as the primary use"), available at <http://ci.fort-worth.tx.us/development/zoning/ordinance/index.htm>.

construe accessory use provisions quite narrowly.⁷⁷ The resolution of these disputes often turns on seemingly silly distinctions. For example, the New Hampshire Supreme Court held that a roofing contractor could not use his residence as a business headquarters where he maintained business records and conducted business by mail and telephone.⁷⁸ The Massachusetts Supreme Judicial Court, however, held that a homeowner could use the sunroom in his house to make telephone calls and pay bills related to his masonry business, in part because he *did not maintain a filing cabinet in the sunroom*.⁷⁹

Perhaps in an effort to reduce the uncertainty caused by these vague restrictions, most municipalities have enacted zoning restrictions that more specifically address home-based businesses.⁸⁰ Some cities simply prohibit all home occupations in residential zones.⁸¹ Zoning codes in jurisdictions that do not prohibit all home occupations often list permitted occupations, prohibited occupations, or both.⁸² Many allow "professionals" to ply their trade

77. See generally H.C. Lind, Annotation, *What Constitutes a "Home Occupation" or the Like Within Accessory Use Provision of Zoning Regulation*, 73 A.L.R.2d 439 (1960); Lewis J. Smith, Note, *Zoning: Accessory Uses and the Meaning of the "Customary"-Requirement*, 56 B.U. L. REV. 542 (1976).

78. See *Perron v. City of Concord*, 150 A.2d 403 (N.H. 1959).

79. See *Wellesley v. Brossi*, 164 N.E.2d 883, 886 (Mass. 1960).

80. See generally ANDERSON & YOUNG, *supra* note 18 (summarizing municipal zoning regulations for home businesses).

81. See, e.g., MESA, ARIZ., ZONING ORDINANCE §§ 11-4-4, 11-5-5 (2000) (prohibiting all "commercial" activities in residential zones), available at <http://www.ci.mesa.az.us/planning/zonord.htm>.

82. See ANDERSON & YOUNG, *supra* note 18, § 13.02; see also CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.36 (2000) (permitting art studios, dressmaking, professional offices, teaching music to one or two pupils at a time; prohibiting barber and beauty shops, restaurants, and businesses involving retail sales), available at <http://www.ci.corpus-christi.tx.us/services/planning/zoneindex.html>; SPOKANE, WASH., CODE, § 11.19.0320(C)&(D) (2000) (permitting barber or beautician services, dressmaking, tropical fish raising, custom floristry, photography, and repair of watches and small appliances), available at <http://www.spokanecity.org/citycode/default.asp?listing=11.19.0320&history=view>; Gretchen McKay, *Home Businesses May Be Allowed: Rules Would Spell Out Which Occupations Would Be Permitted*, PITT. POST-GAZETTE, Aug. 20, 1997, at N9, available in 1997 WL 11839779 (discussing proposed amendments to the zoning code of Bellevue, Pennsylvania, which would allow attorneys, engineers, architects, accountants, physicians, dentists, real estate and insurance agents, clergy, photographers, artists, and craftsmen to work from home, and prohibit beauty and barber shops, car repair garages, equipment rental, restaurants and catering businesses, kennels or veterinary offices, mortuaries, private clubs, video arcades, bookstores, and theaters).

in residential areas,⁸³ at least if the home office is not their primary one.⁸⁴

In keeping with the idea that "commerce" does not belong in the home, codes that permit professionals to work in their homes usually prohibit nonprofessionals from doing so. Some codes accomplish this expressly, by designating a usually noninclusive list of prohibited occupations.⁸⁵ Other codes simply prohibit all commercial home occupations.⁸⁶ Most often, however, a zoning ordinance that permits professional home offices simply remains silent about other income-producing activities in residential zones.⁸⁷ In such cases, courts, applying the *expressio unius, exclusio alterius* principle, generally find

83. There has been a significant amount of litigation concerning what occupations can properly be considered professional. See ANDERSON & YOUNG, *supra* note 18, § 13.03.

84. See *id.*; see also JEFFERSON PARISH, LA., ORDINANCES §§ 40-92, -107, -127, -147 (2000), available at http://www.municode.com/CGI/IN/om_isapi.dll?infobase=11048.NFO&softpage=mccdoc.

85. See *supra* note 84 and accompanying text. The emphasis on the professional nature of permitted home-based occupations is evident in many ordinances. See, e.g., JEFFERSON PARISH, LA., ORDINANCE § 40-3 (permitting "secondary professional office of a lawyer, engineer, architect, journalist, accountant or other professional person, and salesman, real estate agent, insurance agent and mail order service"); DURHAM COUNTY, N.C., ZONING ORDINANCE § 7.18(8) (2000) ("Professional services such as the offices of an accountant, architect, beautician, engineer, lawyer, or medical practitioner shall be permitted."), available at <http://www.ci.durham.nc.us/departments/planning/zoneord/index.html>; CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.36 (permitting "[p]rofessional office of a doctor, physician, dentist, lawyer, engineer, architect, accountant, salesman, real estate agent, [or] insurance agent").

86. See MESA, ARIZ., ZONING ORDINANCE § 11-1-6 (2000) (defining "commercial use" as "[t]he buying, selling, leasing, or storage of real or personal property, or the furnishing of services for compensation"), available at <http://www.ci.mesa.az.us/planning/zonord.htm>.

87. See ANDERSON & YOUNG, *supra* note 18, § 13.03; see also SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030 (2000) (permitting designated professional trade to operate a home office), available at <http://www.ci.sl.c.ut.us>. These types of provisions have led to disputes about which occupations are properly considered permissible "professions" and which ones are prohibited "commercial" enterprises or "businesses." Courts have found that numerous occupations are prohibited "businesses." For hairdressers and barbers, see *Gold v. Zoning Bd. of Adjustment*, 143 A.2d 59 (Pa. 1958); *LaMontagne v. Zoning Bd. of Review*, 186 A.2d 239 (R.I. 1962). For insurance agents, see *McVey v. Reichley*, 152 N.E.2d 321 (Ohio Ct. App. 1957); *Reich v. City of Reading*, 284 A.2d 315 (Pa. Commw. Ct. 1971). For real estate agents, see *Dlugos v. Zoning Bd. of Appeals*, 416 A.2d 180 (Conn. Super. Ct. 1980); *Seaman v. Zoning Bd. of Appeals*, 165 N.E.2d 97 (Mass. 1960); *Township of Ridley v. Pronesti*, 244 A.2d 719 (Pa. 1968). For electrical contractors, see *Board of Adjustment v. Brandi*, 387 A.2d 1016 (Pa. Commw. Ct. 1978). For interior decorators, see *Norton v. Lay*, 360 So. 2d 239 (La. Ct. App. 1978). For consultants, see *Keefe Co. v. Board of Adjustment*, 409 A.2d 624 (D.C. 1979). For carpet cleaners, see *City of Boise City v. Gabica*, 675 P.2d 354 (Idaho Ct. App. 1984). And for lobster sellers, see *Town of Kittery v. Hoyt*, 291 A.2d 512 (Me. 1972).

that the approval of professional occupations implies the disapproval, and hence exclusion, of other types of home businesses.⁸⁸

Virtually all cities that permit some home-based enterprises, however, restrict their size and scope.⁸⁹ For example, zoning codes commonly restrict the physical configuration of a home business by placing limitations on the space that a resident may devote to a home business—usually 25% of the floor space or less,⁹⁰ requiring that the home business be conducted solely within the confines of the home and not in any exterior structure, including attached garages,⁹¹ and prohibiting a resident from physically altering her home to accommodate the business.⁹² In addition, almost all codes strictly limit who can work in home businesses. Most require the proprietor of the business to reside in the dwelling,⁹³ and prohibit her from hiring any employees that do not also reside there.⁹⁴ Zoning codes also regulate the internal practices of home businesses by precluding client or customer visits,⁹⁵ thus, prohibiting all commercial transactions and/or

88. See ANDERSON & YOUNG, *supra* note 18, § 13.03.

89. See generally *id.* §§ 13.21-26; Bennett, *supra* note 21.

90. See ANDERSON & YOUNG, *supra* note 18, § 13.26; see also TOPEKA, KAN., CODE § 48-29.01(a)(9)(a)(7) (2000) (25% of floor space), available at <http://www.topeka.org/departmt/codebook/apendixc.htm>; JEFFERSON PARISH, LA., ORDINANCE § 40-3 (2000) (15% of floor space); DURHAM COUNTY, N.C., ZONING ORDINANCE § 7.18(2) (2000) (25% of floor space or 400 square feet); ALBUQUERQUE, N.M., ZONING CODE § 14-6-2-2(7)(e) (2000) (25% of floor area), available at http://www.amlegal.com/albuquerque_nm; SPOKANE, WASH., CODE § 11.19.0320(B)(3) (2000) (the lesser of 25% of floor space or 200 square feet), available at <http://www.spokanecity.org/CityCode/default.asp?listing=11.19.0320&history=view>.

91. See DURHAM COUNTY, N.C., ZONING ORDINANCE § 7.18(3); CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.36 (2000), available at <http://www.ci.corpus-christi.tx.us/services/planning/zoneindex.html>; SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030(H)(3); SPOKANE, WASH., CODE § 11.19.0320(B)(4).

92. See TOPEKA, KAN., CODE § 48-29.01(a)(9)(a)(3); SALT LAKE CITY, UTAH, ZONING ORDINANCE § 1A.36.030(G)(14); SPOKANE, WASH., CODE § 11.19.0320(B)(1).

93. See ANDERSON & YOUNG, *supra* note 18, § 13.21.

94. See PARADISE VALLEY, ARIZ., ZONING ORDINANCE § 201 (2000), available at <http://www.ci.paradise-valley.az.us/Townhall/ZoningOrd.htm>; TAMPA, FLA., ZONING ORDINANCE § 27-131(2) (2000), available at http://www.municode.com/CGI-BIN/om_isapi.dll?infobase=10132.NFO&softpage=mccdoc; JEFFERSON PARISH, LA., ORDINANCE § 40-3; DURHAM COUNTY, N.C., ZONING ORDINANCE § 7.18(1); ALBUQUERQUE, N.M., ZONING ORDINANCE § 14-16-2-2(7)(b); FORT WORTH, TEX., ZONING ORDINANCE § 9-1.02 (1999), available at <http://www.ci.fort-worth.tx.us/development/zoning/ordinance/index.htm>; SPOKANE, WASH., CODE § 11.19.0320(B)(5); ANDERSON & YOUNG, *supra* note 18, § 13.22. A few codes permit home businesses to hire one employee. See, e.g., TOPEKA, KAN., CODE § 48-29.01(a)(9)(a)(2); CORPUS CHRISTI, TEX., ZONING CODE § 3-1.36.

95. Compliance with these provisions would preclude the proprietor from taking advantage of the federal income tax deduction available for home offices. See 26 U.S.C. §

sales of any product.⁹⁶ Many codes also make it illegal for a home business to manufacture a product,⁹⁷ to maintain any inventory on the premises,⁹⁸ or to use any "equipment" that is not customarily used for household purposes.⁹⁹ Finally, proprietors often are precluded from advertising their business through product displays and/or signs visible from the street.¹⁰⁰

III. WHY THE HOME-BUSINESS DILEMMA MATTERS

The casual observer of this situation might think, "So what?" After all, the fact that zoning laws prohibit residents from doing something in their homes rarely leads to rallying cries for legislative reform. Most zoning rules likely are perceived to be "shorthand of the unstated rules governing what are widely regarded as correct social categories."¹⁰¹ For

280A(c)(1)(B) (1994 & Supp. IV 1998) (mandating that the tax deduction is available only if one's home is one's principle place of business or is used for "meeting or dealing" with "patients, clients, or customers").

96. See, e.g., TOPEKA, KAN., CODE § 48-29.01(a)(9)(a)(4); CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.36; FORT WORTH, TEX., ZONING ORDINANCE § 9.1.02; ANDERSON & YOUNG, *supra* note 18, § 13.24.

97. See ALBUQUERQUE, N.M., ZONING CODE § 14-16-2-2(A)(7)(c); SPOKANE, WASH., CODE § 11.19.0320(B)(8); see also SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030(C) (prohibiting welding shops, machine shops, and cabinetmaking).

98. See JEFFERSON PARISH, LA., ORDINANCE § 40-3; ALBUQUERQUE, N.M., ZONING CODE § 14-16-2-2(A)(7)(c); FORT WORTH, TEX., ZONING ORDINANCE § 9.1.02; SPOKANE, WASH., CODE § 11.19.0320(B)(8); cf. SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030(H)(10) ("Stock-in-trade, inventory, or other merchandise shall be allowed to be kept only in the interior space of the dwelling.").

99. See ANDERSON & YOUNG, *supra* note 18, § 13.23; see also SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030(H)(8) ("No mechanical or electrical apparatus, equipment or tools shall be permitted in the home occupation except those which are commonly associated with a residential use or as are customary to home crafts . . .").

100. See ANDERSON & YOUNG, *supra* note 18, § 13.25; see also PARADISE VALLEY, ARIZ., ZONING ORDINANCE § 201 (2000), available at <http://www.ci.paradise-valley.az.us/Townhall/ZoningOrd.htm> (permitting nameplate not more than one square foot); TOPEKA, KAN., CODE § 48-29.01(a)(9)(a)(3) (generally prohibiting exterior signs); JEFFERSON PARISH, LA., ORDINANCE § 40-3 (permitting small nameplate); DURHAM COUNTY, N.C., ZONING ORDINANCE § 7.18(4) (2000) ("No display of goods, products or services shall be visible from off site."), available at <http://www.ci.durham.nc.us/departments/planning/zoneord/index.html>; CORPUS CHRISTI, TEX., ZONING ORDINANCE § 3-1.36 (permitting small nameplate but prohibiting external displays); SALT LAKE CITY, UTAH, ZONING ORDINANCE § 21A.36.030(H)(15) (allowing "one nonilluminated nameplate . . . mounted flat against the building"); SPOKANE, WASH., CODE § 11.19.0320(B)(6) (prohibiting commercial advertising except small nameplate).

101. PERIN, *supra* note 20, at 3.

example, zoning laws probably prohibit residents in most neighborhoods from raising pigs or chickens, and the pages of modern law reviews are hardly filled with pleas for regulatory relief by swine and fowl lovers. Yet whatever the value of the majority of zoning classifications—and they are perennially under attack—there are strong reasons to believe that zoning law's separation of the categories of "home" and "work" has outlived, or is rapidly outliving, its usefulness. In the section that follows, therefore, I set forth five arguments why the regulatory status quo *should* concern lawmakers.

A. *The Elusive Quest for "Balance"*

The first reason that lawmakers should reconsider current zoning restrictions is that for many Americans, especially women with children, working at home offers the best (and in some cases the only) way to balance the competing demands of work and family. Between 1960 and 1996, the percentage of married women who had children under age six and who also worked outside the home rose from 20.2% to 62.3%.¹⁰² The stress placed upon parents and children in this situation increasingly has led to calls for more family-friendly policies at work, including part-time, flex-time, and job sharing.¹⁰³ While these

102. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., 1998 GREENBOOK 661.

103. See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2024 (1996) (discussing women's need for flexible work schedules to accommodate demands of child rearing); Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 194-96 (1995) (same); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 619-20 (1993) (arguing that lack of access to flexible work has impeded women's economic prospects); see also Peter Beller & Mark Shauerte, *Diversity Survey: Women Mark Decade of Progress But Note More Goals at Law Firms*, CHI. LAW., June 2000, at 8 (finding that law firms are offering flex-time and part-time schedules to accommodate and retain women lawyers with young children); Rosemary Bennett, *Banking 'Performs Poorly on Flexible Working'*, FIN. TIMES (London), July 5, 2000, at Nat'l News 6; John A. Challenger, *There Is No Future for the Workplace*, THE FUTURIST, Oct. 1998, at 16, 17 ("The Bureau of Labor Statistics reports that 27% of the civilian labor force worked flexible schedules last year. That is an increase of almost 83% from 1991, when only 15% of workers had flexible hours."); Carol Kleiman, *Family-Friendly Economy Betters Workers' Lives*, CHI. TRIB., June 13, 2000, at Business 1, available in 2000 WL 3673914; Carol Kleiman, *Part-Time Options Can Pay Dividends for Employers*, STAR-LEDGER (Newark, N.J.), July 10, 2000, at 28, available in 2000 WL 23588676; Alexandra Marks, *Candidates Cater to Parents, But Miss Top Concern: Time*, CHRISTIAN SCI. MONITOR, June 23, 2000, at USA 2, available in LEXIS, News Library, Christian Science Monitor File; Katherine Hunt Medill,

policies offer some day-to-day relief, they have serious economic consequences.¹⁰⁴ Economist June O'Neill, among others, has long argued that the persistence of a "wage gap" between men and women is at least partially attributable to the fact that women with children work fewer hours than men, often choose to move to lower paying jobs that offer more flexible schedules, are less willing to make extreme personal sacrifices for their employers, and are more likely to demand that their employers accommodate their personal lives, including the demands of child rearing.¹⁰⁵ O'Neill's hypothesis finds support in the fact that while American women as a whole continue to earn approximately 75% of what men do, women ages twenty-seven to thirty-three who have never had a child earn upwards of 98% as much as men with similar education and work experiences.¹⁰⁶ Recent surveys of women suggest that they will continue to make career choices that reinforce this trend.¹⁰⁷

As Flex Time Catches On, Workers and Employers Fight to Control It, CHI. DAILY HERALD, Mar. 26, 2000, at 4, available in 2000 WL 17102566 (noting that the number of full-time workers working "flex time" grew from 12.4% in 1985 to 28% in 1997); Deborah Stead, *Women on the Tightrope: Two Views*, N.Y. TIMES, Oct. 5, 1997, at 3-7 (reviewing two books discussing pressures on women in the workforce); Kerry Townsend, *Female Partners Double Thanks to Gender Initiative*, FIN. TIMES (London), May 8, 2000, at Survey—the Work/Life Balance 2.

104. See McCaffery, *supra* note 103, at 674 (noting that "women have been given a stark choice: act like men have traditionally acted in the work force, or get out"); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 724 (1998) (discussing research demonstrating that mothers "opt for the 'mommy track' rather than succumbing to the open-ended availability that most high-paying, demanding jobs require").

105. See June Ellenoff O'Neill, *The Cause and Significance of the Declining Gender Gap in Pay*, in NEITHER VICTIM NOR ENEMY: WOMEN'S FREEDOM NETWORK LOOKS AT GENDER IN AMERICA 1, 1-6 (Rita J. Simon ed., 1995); June O'Neill, *The Trend in the Male-Female Wage Gap in the United States*, 3 J. LAB. ECON. S91, S96-111 (1985); June O'Neill & Solomon Polachek, *Why the Gender Gap in Wages Narrowed in the 1980s*, 11 J. LAB. ECON. 205, 218-24 (1993); see also McCaffery, *supra* note 103, at 624-34 (arguing that the gender gap narrows primarily because women's labor force participation increasingly has come to parallel that of men).

106. See DIANA FURCHTGOFF-ROTH & CHRISTINE STOLBA, *WOMEN'S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA* 14 (1996) (discussing several O'Neill studies).

107. Two years ago, for example, Liz Nickles and Laurie Ashcraft released the third segment of their three-decade survey of women's attitudes towards work and family. When they surveyed women in the late 1980s, Nickles and Ashcraft found that women were "gung ho," working full time and complaining about the level of stress and lack of support. By the late 1990s, the women surveyed had rejected this model altogether. Indeed, only 23% of working women surveyed in the late-90s said that a career was more important than being

Growing numbers of women have come to view working for themselves as a reasonable and perhaps more lucrative alternative¹⁰⁸ to the "mommy track" jobs that many critics argue relegate women to second-class status in the workplace.¹⁰⁹ Women are starting businesses in record numbers.¹¹⁰ Indeed, women-owned businesses are one of the fastest growing segments of the American economy,¹¹¹ totaling an estimated 8.5 million businesses contributing an estimated \$3.1 trillion in revenue to the economy in 1997.¹¹² Many of these entrepreneurs choose to work from home: 67% of the nation's full-time home-based

a wife and mother. Instead, Nickles and Ashcraft found that both working and nonworking women expressed the same priorities. They considered home and family more important as a career and valued quantity more than "quality" time with their kids. See Patricia Edmonds, *What Women Want Now: They're More Focused on Home—And Feel Less Guilty about It—Than Anytime in the Past 20 Years. Now the Word is Balance*, USA WEEKEND, Oct. 25, 1998, at 4, available in 1998 WL 8302877; see also Charmaine Crouse Yost, *Make Way for Mom, Inc.*, POL. REV., July-Aug. 1996 (discussing Roper Starch survey of 3000 employed women with children that found 43% would "prefer to stay home" full time and 87% would like "to spend more time caring for their children"), available at <http://www.policyreview.com/jui96/homef.html>.

108. See Marie C. Franklin, *Women Turning to Entrepreneurial Options; Female Owned Firms Have More Employees than the Fortune 500*, BOSTON GLOBE, May 22, 1995, available in LEXIS, News Library, Boston Globe File ("Women are starting their own businesses for a variety of reasons: upward mobility, the chance to set their own policies and flexibility around family issues."); Anne Murphy, *The Start-Up of the '90s, INC.*, Mar. 1992, at 32 (suggesting that many women start businesses for "reactionary reasons: to escape the glass ceiling, gain the flexibility to raise a family, or win access to opportunities closed off to them in a corporate world"). For an interesting international perspective, see Faranak Miraftab, *(Re)Production at Home: Reconceptualizing Home and Family*, 15 J. FAM. ISSUES 467 (1994) (discussing her study of women-owned home-based enterprises in Mexico and concluding that working from home had positive effects on women's authority within the home).

109. See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2374-75 (1994) (discussing argument that "mommy track" jobs cause "tokenism and segregation"). See generally DOROTHY P. MOORE & E. HOLLY BUTTNER, *WOMEN ENTREPRENEURS MOVING BEYOND THE GLASS CEILING* (1997); Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117 (1997).

110. See Murphy, *supra* note 108, at 32 (noting that "women now own almost one out of every three sole proprietorships in the country"). See generally U.S. SMALL BUS. ADMIN., *WOMEN IN BUSINESS* (1998) [hereinafter *WOMEN IN BUSINESS*] (discussing the significant growth in the number of women-owned businesses).

111. See *WOMEN IN BUSINESS*, *supra* note 110, at 2 (finding that number of women-owned businesses increased 43% between 1987 to 1992, compared with a 26% increase in all businesses; receipts of women-owned businesses increased 92% over same period, compared to 38.5% overall).

112. See *id.* at 1.

workers are women,¹¹³ and over 60% of all women-owned businesses were operated at home when first established.¹¹⁴ This arrangement, while certainly not stress-free,¹¹⁵ does allow parents to spend more time with their children.¹¹⁶ It also reverses the two-century-old trend

113. See Edwards & Field-Hendrey, *supra* note 8, at 27; see also WOMEN IN BUSINESS, *supra* note 110, at 11 (citing data from the U.S. Census Bureau that in 1992 women owned 36.9% of the estimated 9 million home-based businesses).

114. See WOMEN IN BUSINESS, *supra* note 110, at 2; see also PRATT, *supra* note 9, at 84 (finding that half of women-owned businesses were home-based).

115. See, e.g., Mary L. Carsky et al., *An Integrated Model of Homebased Work Effects on Family Quality of Life*, 23 J. BUS. RES. 37 (1991) (reviewing studies that suggest that working from home has mixed effects on family quality of life); Hilary Silver, *Homework and Domestic Work*, 8 SOC. FORUM 181, 199-200 (1993) (reviewing studies finding that working from home decreased tension between work and family roles for working-class women with children but increased it for professional women); see also Edward Baig, *Saying Adios to the Office*, BUS. WK., Oct. 12, 1998, at 152, available in LEXIS, News Library, Business Week File; Kathryn Balint, *Portable Workplace is Coming Unplugged, Managers, Workers Say Telecommuting Not Worth Trade-offs*, SAN DIEGO UNION-TRIB., May 8, 2000, at A1, available in LEXIS, News Library, San Diego Union-Tribune File; Matthew Brelis, *Beyond Lonely: Life as a Telecommuter*, BOSTON GLOBE, Jan. 17, 1999, at C1, available in LEXIS, News Library, Boston Globe File; Robert E. Calem, *Working at Home, for Better or Worse*, N.Y. TIMES, Apr. 18, 1993, at 3-1; Janet Kidd Stewart, *Letter from Home; Out-of-Sight Telecommuters Might Be Out of Mind*, CHI. TRIB., Apr. 5, 1998, at Womanews 7, available in LEXIS, News Library, Chicago Tribune File.

116. See, e.g., Edwards & Field-Hendrey, *supra* note 8, at 26-27 (attributing rise in number of home-based workers in part to "the continued rise in women's labor force participation and in two-career families"); *id.* at 33 (finding it "unsurprising" that workers in need of "flexibility—women in general and especially those with young children at home . . . have a greater representation among home-based workers"); Harriet B. Presser & Elizabeth A. Bamberger, *American Women Who Work at Home for Pay: Distinctions and Determinants*, 74 SOC. SCI. Q. 815, 835-36 (1993) (finding positive correlation between number of children and likelihood of working from home); see also Laura R. Felder, *Parents Get Support at Home, FEMALE Brings Support to County's Moms and Dads*, DET. NEWS, May 8, 2000, at Metro 5, available in LEXIS, News Library, Detroit News File; Ellen Hoffman, *Make Money, Work Barefoot*, GOOD HOUSEKEEPING, May 1999, at 99; Anita Mabante Leach, *Workers Feel at Home on the Job; Self-Employed Moms Share Entrepreneurial Experiences*, ARIZ. REPUBLIC, July 3, 1999, at Comm. 4, available in LEXIS, News Library, Arizona Republic File; Amy Saltzman, *You, Inc.*, U.S. NEWS & WORLD REP., Oct. 28, 1996, at 66, available in LEXIS, News Library, U.S. News & World Report File; Sue Shellenbarger, *Work & Family: Parents of Teens Find Some Peace of Mind In Working at Home*, WALL ST. J., June 18, 1997, at B1; Andrea Stone, *Women on Campus Say They Want It All*, USA TODAY, Feb. 17, 1999, at 8A, available in LEXIS, News Library, USA Today File; Yoest, *supra* note 109 ("Home-grown entrepreneurship offers many women a way to honor their commitment to family while pursuing professional challenges. This entrepreneurial spirit has allowed some women to regain control of their lives . . ."). The emotionally loaded question of how day care and parental absence affects young children aside, some psychological research suggests that children benefit from observing parents perform work from home. See, e.g., Betty A. Beach, *Children at Work: The Home Workplace*, 3 EARLY CHILDHOOD RES. Q. 209, 219-20

of removing productive activity from the home—an arrangement that some feminists have long decried as placing women at a relative disadvantage socially and economically.¹¹⁷

Dozens of books and Internet websites target these “mompreneurs,”¹¹⁸ promising to provide tips about identifying a lucrative market, starting a home business or locating a telecommuting job, and avoiding “home business scams.”¹¹⁹ However, many of the businesses recommended as “ideal” home occupations, as well as businesses in those industries dominated by women-owned firms and businesses that women have in fact chosen to start from home, are illegal in most of America. Data from the U.S. Small Business Administration suggests that most women-owned home-based firms produce goods and services and are concentrated in industries such as construction, manufacturing, and wholesale/retail trade¹²⁰—all the types of “commercial” enterprises banned under most zoning laws.¹²¹ Furthermore, the National Foundation for Home Business Owners estimates that women-owned home-based businesses employ 14

(1988) (highlighting that children whose parents worked from home had “meaningful involvement” in their parent’s daily lives and gained “early understanding of . . . work’s tools and processes”).

117. See generally HAYDEN, *supra* note 2 (discussing early feminist efforts to secure pay for domestic work).

118. The “mompreneur” was the focus of Ellen H. Parlapiano and Patricia Cobe’s 1996 book, *Mompreneurs: A Mother’s Practical Step-by-Step Guide to Work-at-Home Success*. See PARLAPIANO & COBE, *supra* note 14.

119. See JENNIFER BASYE, 101 BEST EXTRA-INCOME OPPORTUNITIES FOR WOMEN (1997); CHERYL DEMAS, THE WORK-AT-HOME MOM’S GUIDE TO HOME BUSINESS: STAY AT HOME AND MAKE MONEY WITH WAHM.COM (2000); FOLGER, *supra* note 14; PRISCILLA Y. HUFF, 101 BEST HOME-BASED BUSINESSES FOR WOMEN (2d ed. 1998); KATINA Z. JONES, THE 150 MOST PROFITABLE HOME BUSINESSES FOR WOMEN (2000); PARLAPIANO & COBE, *supra* note 14; ROBERTS, *supra* note 14; *Bizy Moms.com: The Ultimate Work At Home & Stay At Home Moms Resource*, at <http://www.bizymoms.com> (last visited Oct. 30, 2000); *HerHomeOffice.com: Earn Money While Working at Home*, at <http://www.herhomeoffice.com> (last visited Oct. 30, 2000); *HomeWorkingMom.com: The Best Resources for Moms Who Choose To Work At Home*, at <http://www.homeworkingmom.com/> (last visited Oct. 30, 2000); *WAHM.com: The Online Magazine for Work at Home Moms*, at <http://www.wahm.com> (last visited Oct. 30, 2000); *Working Moms Refuge: Career*, at <http://www.momsrefuge.com/telecommute/> (last visited Oct. 30, 2000).

120. See PRATT, *supra* note 9, at 38; see also WOMEN IN BUSINESS, *supra* note 110, at 6-7 (finding that between 1987 and 1992 the number of women-owned businesses grew fastest in wholesale trade, construction, transportation, communications, and public utilities).

121. See *supra* notes 85-100 and accompanying text.

million people, arrangements that frequently run afoul of zoning codes.¹²²

B. Bootstraps Entrepreneurs Need a Place to Earn a Living

The second reason that restrictions on home businesses have become problematic is that working from home may enable people with limited education and job-related skills to achieve economic self-sufficiency. In 1996, Congress eliminated the sixty-year-old federal welfare entitlement and replaced it with the new program, Temporary Assistance for Needy Families, which requires all recipients to secure employment within two years and bars recipients from receiving benefits for longer than five years.¹²³ While early results of the welfare reform effort have exceeded expectations, many individuals struggle to make the transition from welfare to work.¹²⁴ An economic downturn resulting in new rounds of layoffs could wreak havoc on individuals who only recently exited welfare rolls and may be barred forever from returning.¹²⁵ The low-skilled individuals who face welfare time limits and work requirements are among the most vulnerable in the modern economy. Not only will they likely lose under the "last-hired/first-fired principle," but also over the past forty years the "blue collar" jobs that traditionally provided high wages for workers lacking formal education and training increasingly have been supplanted by jobs in service-oriented industries, where employers tend to require specialized skills and higher levels of education.¹²⁶

122. See Yoest, *supra* note 107.

123. See Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C. and 8 U.S.C. (Supp. IV 1998)).

124. See, e.g., SARAH BRAUNER & PAMELA LOPREST, THE URBAN INSTITUTE, WHERE ARE THEY NOW? WHAT STATES' STUDIES OF PEOPLE WHO LEFT WELFARE TELL US 8-9 (1999) (suggesting that the available data undermines a "sunny" picture of welfare reform); CENTER ON URBAN & METRO. POLICY, BROOKINGS INST., THE STATE OF WELFARE CASELOADS IN AMERICA'S CITIES: 1999, at 1 (1999) (finding that some urban areas have experienced increases in welfare caseloads), available at <http://www.brook.edu/es.urban/caseload.pdf>.

125. Indeed, there is anecdotal evidence that previous rounds of layoffs and corporate downsizing fueled the home business craze. See, e.g., *Executive Update*, INVESTOR'S BUS. DAILY, May 2, 1996, at A4 (suggesting that "running a home-based business may be a good career move for downsized managers, engineers and salespeople").

126. See generally Schill, *supra* note 73, at 799-808 (discussing "spatial mismatch" hypothesis as cause of concentration of poverty in the United States). Over the past 30 years, many major cities experienced sizable employment losses in industries with low mean

Home businesses might offer a partial buffer against these economic realities, leading some state legislatures to consider the option of increasing opportunities to work at home as an economic development tool.¹²⁷ The fact that welfare recipients lack the skills demanded by large, service-oriented employers does not necessarily mean that they lack marketable skills altogether. The success of "microenterprise" programs, which provide small loans that enable low-income individuals to become entrepreneurs, suggests that many welfare recipients have skills that enable them to become entrepreneurs, thereby achieving self-sufficiency without depending upon an employer.¹²⁸

Consider two examples. First, there is a dire need among the single mothers who make up the bulk of welfare recipients¹²⁹ for quality, loving childcare.¹³⁰ Obviously, many thousands of welfare recipients

levels of employee education and gains in industries that employed better-educated workers. "[D]uring the 1980s New York City lost 135,000 jobs in industries in which workers averaged less than twelve years of education, and gained almost 300,000 jobs in industries in which workers had thirteen or more years of education." WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF NEW URBAN POOR* 32 (1996). Philadelphia, Boston, and Baltimore experienced a fate similar to that of New York, losing jobs in "low-education" industries while gaining positions for college-educated employees. *See id.*

127. *See, e.g.*, H.B. 3798, 81st Reg. Sess. (Minn. 2000) (proposing telecommunication centers for rural and distressed areas).

128. *See generally* LISA J. SERVON, *BOOTSTRAP CAPITAL: MICROENTERPRISES AND THE AMERICAN POOR* (1999) (discussing microenterprise development programs); Margaret Beebe Held, *Developing Microbusinesses in Public Housing: Notes From The Field*, 31 HARV. C.R.-C.L. L. REV. 473, 474-79 (1996) (discussing field study of home-based businesses in one Knoxville, Tennessee public housing project); *see also* Joan Olek, *A Lending Hand*, BUS. WK., Feb. 28, 2000, at 40 (discussing microloan programs aimed at "bootstrap[ing] people out of poverty through entrepreneurship"), *available in* LEXIS, News Library, Business Week File).

129. Of the 4.3 million adults receiving AFDC in 1995, 3.8 million, or 88%, were women. Ninety percent of those women were single mothers of dependent children. *See* BUREAU OF TRANSP. STATISTICS, U.S. DEPT OF TRANSP. *WELFARE REFORM AND ACCESS TO JOBS IN BOSTON* 2 (1999), *available at* <http://www.bts.gov/programs/transstu/welfare.pdf>.

130. For discussions of the relationship between working mothers and child care availability, *see generally* U.S. GEN. ACCOUNTING OFFICE, *WELFARE REFORM: IMPLICATIONS OF INCREASED WORK PARTICIPATION FOR CHILD CARE* (1997), *available at* <http://www.gao.gov/AIndexFY97/abstracts/97075.htm>; U.S. GEN. ACCOUNTING OFFICE, *WELFARE TO WORK: CHILD CARE ASSISTANCE LIMITED; WELFARE REFORM MAY EXPAND NEEDS* (1995); Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 189-91 (1995); Marian Wright Edelman, *Clinton's Child-Care Initiative Is Good News for U.S. Children*, CHI. TRIB., Feb. 1, 1998, at Womanews 9, *available in* LEXIS, News Library, Chicago Tribune File; Richard Wolf, *Child-care Tested as a Solution to Welfare*, USA TODAY, Jan. 16, 1997, at A4, *available in* LEXIS, News Library, USA Today File.

have the skills to provide this important service; women have long earned extra money by caring for a few children in their homes.¹³¹ (Indeed, this is precisely the childcare arrangement that I have chosen for my own daughter: a wonderful grandmother cares for her and three other children in her own home.) Second, consider the muffin lady: Linda Fisher, a single mother from Westminster, Maryland, drew national attention a few years ago when she was fined for selling fresh-baked muffins door-to-door in an effort to support herself and her son. Fisher learned to her surprise that her business was illegal, but she ultimately was able to return to baking after the local volunteer fire department made its oven available to her.¹³²

The success of women like Linda Fisher hinges on their having a place to work. Unfortunately for many of the low-skilled individuals struggling to exit welfare rolls, that place is home or nowhere. The "Muffin Lady" was lucky, but local fire departments can hardly rescue all low-income mothers in need. For many, the inability to work at home dashes all hopes of becoming an entrepreneur. Leasing commercial space costs money—a significant sum of money—and most recent welfare recipients lack the resources (or the credit) to secure it. In contrast, however, the vast majority of home-based businesses require less than \$5000 in start-up capital,¹³³ and most entrepreneurs, especially women and minorities, do not rely upon bank loans to get these businesses off the ground.¹³⁴ Furthermore, working from home enables former welfare recipients to balance work and family responsibilities, a prospect that, if daunting to any parent, can be

131. See, e.g., Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 507-08 (1996) (noting that "[s]ome states have tried to increase the availability of child care through zoning laws. Thus localities have exempted family day care (day care in the provider's own home) from business exclusions otherwise applicable in residential neighborhoods.")

132. See Katherine Shaver, *For 'The Muffin Lady,' Some Home-Baked Troubles*, WASH. POST, Feb. 13, 1997, at A1. Fisher's initial misfortune turned out to be a blessing in disguise, leading to appearances on national television, a cookbook, and offers to franchise her business. See Carole Sugarman, *Muffin Makeovers: Recipes and Reflections From Linda Fisher, Rebuilding Her Life One Batch at a Time*, WASH. POST, Feb. 17, 1998, at E1.

133. See, e.g., Barbara Pressley Noble, *Home Office: The Right Attitude, and the Right Stuff*, N.Y. TIMES, May 28, 1995, at C11 (discussing how entrepreneurs can fully equip their home offices for less than \$5000).

134. See PRATT, *supra* note 9, at 84-86 (finding that 5 % of women and minority-owned firms, compared to 50 % of firms owned by white men, sought outside loans for start-up capital).

overwhelming for a young mother struggling to achieve economic self-sufficiency.¹³⁵

It is not surprising, therefore, that a majority of the enterprises funded by microenterprise programs are small, home-based businesses.¹³⁶ Nor is it surprising that many of them apparently are forced to operate in the underground economy. Zoning codes are skewed in favor of high-end, white-collar occupations, limiting the privilege of working at home to "professionals" such as doctors, lawyers, and accountants.¹³⁷ While these prohibitions likely outlaw most home businesses,¹³⁸ the hostility to "commercial" enterprises significantly disadvantages lower-skilled workers, by precluding the operation of businesses that may be the *most* attractive to them; indeed, a recent study of home-based businesses found that the vast majority of women- and minority-owned home-based businesses produce goods and services and work in industries that likely would be considered "commercial" rather than "professional."¹³⁹

C. The Ban on Dot-coms

The third reason that local officials should confront the home business dilemma is that zoning codes drafted before the mainframe are ill-equipped to tackle the dot-com. The "technological revolution" in general, and the Internet in particular, has dramatically increased opportunities to work from home.¹⁴⁰ Telecommuting is rapidly

135. See *supra* notes 129-32 and accompanying text.

136. See SERVON, *supra* note 128, at 42.

137. See *supra* notes 80-88 and accompanying text.

138. See BUREAU OF LABOR STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY WORK AT HOME IN 1997 tbl. 1 (1998) [hereinafter WORK AT HOME IN 1997], available at <http://www.bls.gov/news.release/homey.nws.htm> (finding that only 18% of self-employed home-based workers engaged in "professional specialty" work).

139. See PRATT, *supra* note 9, at 38, 86-88 (finding women-owned firms concentrated in agricultural services, construction, manufacturing, and wholesale and retail trade; black-owned firms concentrated in agriculture, construction, manufacturing, and wholesale trade; Hispanic-owned firms concentrated in agriculture, construction, and services); see also Presser & Bamberger, *supra* note 116, at 832-33 (identifying the most popular occupations of women who work from home as childcare, bookkeeping, secretarial services, sales, cosmetology, artists and designers, household cleaning services, and textile workers).

140. See WORKATHOME IN 1997, *supra* note 138 (finding that approximately 60% of home-based workers used computers); U.S. SMALL BUS. ADMIN., E-COMMERCE: SMALL BUSINESSES VENTURE ONLINE (1999) [hereinafter SMALL BUSINESSES VENTURE ONLINE] (finding that information technology and e-commerce make it easier to start a home business), available

becoming a mainstream employment arrangement, with estimates of the number of people engaged in some form of "distance work" generally ranging around 20 million.¹⁴¹ Resources for those engaged in or seeking to engage in this employment arrangement abound,¹⁴² especially on the Internet,¹⁴³ suggesting that millions more may take advantage of the option in the near future.¹⁴⁴ Indeed, at least one

at http://www.sba.gov/advo/stats/e_comm.pdf; Edwards & Field-Hendrey, *supra* note 8, at 26-27 (attributing growth in home-based workers to technological advances, among other causes).

141. See, e.g., WORK AT HOME IN 1997, *supra* note 138 (estimating that more than 21 million persons did some work at home as part of their primary job in 1997); JOANNE H. PRATT, INTERNATIONAL TELEWORK ASSOCIATION & COUNCIL, 1999 TELEWORK AMERICA NATIONAL TELEWORK SURVEY: COST/BENEFITS OF TELEWORKING TO MANAGE WORK/LIFE RESPONSIBILITIES 1 (1999) [hereinafter PRATT, TELEWORK AMERICA] (finding that "19.6 million teleworkers typically work 9 days per month at home with an average of 3 hours per week during normal business hours"), available at http://www.telecommute.org/twa/twa_research_exec_summary.doc.

142. See, e.g., SANDY ANDERSON, THE WORK AT HOME BALANCING ACT: THE PROFESSIONAL RESOURCE GUIDE FOR MANAGING YOURSELF, YOUR WORK, AND YOUR FAMILY AT HOME (1998); ALICE BREDIN & KIRSTEN LAGATREE, THE HOME OFFICE SOLUTION: HOW TO BALANCE YOUR PROFESSIONAL AND PERSONAL LIVES WHILE WORKING AT HOME (1998); DEBRA A. DINNOCENZO, 101 TIPS FOR TELECOMMUTERS: SUCCESSFULLY MANAGE YOUR WORK, TEAM, TECHNOLOGY, AND FAMILY (1999); EDWARDS & EDWARDS, WORKING FROM HOME, *supra* note 14; NICOLE BELSON GOLUBOFF, TELECOMMUTING FOR LAWYERS (1998); JUNE LANGHOFF, THE TELECOMMUTER'S ADVISOR: REAL WORLD SOLUTIONS FOR REMOTE WORKERS (2d ed. 1999); CLAIRE R. MCINERNEY, PROVIDING DATA, INFORMATION, AND KNOWLEDGE TO THE VIRTUAL OFFICE (1999); JACK M. NILLES, MANAGING TELEWORK: STRATEGIES FOR MANAGING THE VIRTUAL WORKFORCE (1998).

143. See, e.g., *Fern Telecommuting*, at <http://www.ferntelecommuting.com> (last visited Oct. 31, 2000); Gil Gordon Associates, *Telecommuting, Telework and Alternative Officing*, at <http://www.gilgordon.com> (last visited Oct. 31, 2000); ITAC: International Telework Association & Council, at <http://www.telecommute.org> (last visited Oct. 31, 2000); *Jobs from Home*, at <http://www.jobsfromhome.com> (last visited Oct. 31, 2000); Joanne H. Pratt Associates, *Teleworking/Telecommuting Futurists*, at <http://www.joannepratt.com> (last visited Oct. 31, 2000); *Telecommuting*, at <http://www.workathomeparents.com/telecommute.html> (last visited Oct. 31, 2000); *Telecommuting Jobs. Employment Brought Home.*, at <http://www.tjobs.com> (last visited Oct. 31, 2000); *Telecommuting Knowledge Center*, at <http://www.telecommuting.org> (last visited Oct. 31, 2000); *The American Telecommuting Association*, at <http://www.knowledgetree.com/ata.html> (last visited Oct. 31, 2000); *Work From Home Jobs Telecommuting Small Business Resource*, at <http://www.homeworkers.org> (last visited Oct. 31, 2000); *Yahoo! Business and Economy—Employment and Work—Telecommuting*, at http://dir.yahoo.com/business_and_economy/employment_and_work/telecommuting/ (last visited Oct. 31, 2000).

144. See WORK AT HOME IN 1997, *supra* note 138 (noting that the number of wage and salary workers doing paid work at home grew dramatically between 1991 and 1997).

telecommunications expert predicts that the number of "teleworkers" will increase to 100 million by 2015.¹⁴⁵

While zoning laws certainly may impede some of these telecommuting arrangements,¹⁴⁶ their brunt is felt most directly by individuals who operate home-based businesses. And, many of the "hottest" home-business opportunities are technology-based.¹⁴⁷ The U.S. Small Business Administration estimates that 18% of all households with personal computers use them as part of a home-based business and that, by 2003, over 70% of all home businesses will be conducted online.¹⁴⁸ Despite the fact that most "virtual" businesses pose little threat to their neighbors,¹⁴⁹ many popular technology-based

145. See Edward Cornish et al., *The Opportunity Century*, FUTURIST, Jan.-Feb. 2000, at 2 (citing study by Joseph Pelton).

146. Whether telecommuters are covered by zoning restrictions on "home occupations" is an open question; I have not found any reported cases discussing the issue. Presumably, when the question ultimately arises, its resolution will depend on the nature of the employment relationship: while telecommuters who work only a few hours a week from home may be in the clear, zoning restrictions pose a greater threat to the increasing numbers of telecommuters who work full time or maintain their primary office at home. See WORK AT HOME IN 1997, *supra* note 138 (discussing number of full-time home-based workers); Edwards & Field-Hendrey, *supra* note 8, at 27 (same).

147. See SMALL BUSINESSES VENTURE ONLINE, *supra* note 140, at 4; Lacey Burnette, *O'Fallon Man's Internet Surfing Leads to Home-Based Business*, ST. LOUIS POST-DISPATCH, May 9, 2000, at 4, available in LEXIS, News Library, St. Louis Post-Dispatch File; Renee Elder, *Shipping Center Owners Find Customers Close to Home*, THE TENNESSEAN, Dec. 19, 1999, at 3E, available in LEXIS, News Library, Tennessean File; Melissa Hall, *E-Commerce Start Requires Savvy*, AUGUSTA CHRON., Jan. 1, 2000, at O24, available in LEXIS, News Library, Augusta Chronicle File; *Home Based Business and the Internet*, BUS. WIRE, Feb. 16, 2000, available in LEXIS, News Library, Business Wire File; *Small Miracles Getting Bigger*, BUS. WIRE, Mar. 28, 2000, available in LEXIS, News Library, Business Wire File; see also *workathome.com*, at <http://www.workathome.com> (last visited Oct. 31, 2000) (providing an online community for home-based workers). This subject has also found a niche in the "how to" book market. See, e.g., RICK BENZEL, *HEALTH SERVICE BUSINESSES ON YOUR HOME-BASED PC* (1993); MARK BUNTING & MARK SEAL, *VIRTUAL POWER: USING YOUR PC TO REALIZE THE LIFE OF YOUR DREAMS* (FIRESIDE 1999) (1997); EDWARDS & EDWARDS, *MAKING MONEY*, *supra* note 14; BARBARA A. FANSON, *START AND RUN A PROFITABLE DESKTOP PUBLISHING BUSINESS* (1997); RON E. GIELGUN, *121 INTERNET BUSINESSES YOU CAN START FROM HOME PLUS A BEGINNER'S GUIDE TO STARTING A BUSINESS ONLINE* (1998); PEGGY GLENN, *WORD PROCESSING PROFITS AT HOME* (2d ed. 1993); PHIL PHILCOX, *HOW TO EARN MORE THAN \$30,000 A YEAR WITH YOUR HOME COMPUTER: OVER 160 INCOME-PRODUCING PROJECTS* (1999); LISA SHAW, *HOW TO MAKE MONEY PUBLISHING FROM HOME* (1997); HARVEY SUMMERS, *OPERATING A DESKTOP VIDEO SERVICE ON YOUR HOME-BASED PC* (1994); LYNN WALFORD, *MAKE MONEY WITH YOUR PC!* (1994).

148. See SMALL BUSINESSES VENTURE ONLINE, *supra* note 140, at 4.

149. Many virtual businesses do not generate the externalities that disrupt a neighborhood. See *infra* note 193-95 and accompanying text.

home businesses are swept under zoning laws' broad prohibitions. Not only is it difficult to make the case that computer-based businesses are "customary" home occupations, the preference in many zoning codes for professional rather than commercial occupations works to the detriment of "techie" companies. Consider, for example, a few of the businesses suggested in a popular book, *121 Internet Businesses You Can Start from Home*: auto loan broker, bankruptcy consultant, online genealogist, e-mail reminder service, online advertising agency, online dating service, collection agency, legal transcription service, billing service, payroll preparation service, used computer broker, copywriter, desktop publisher, and (my favorite) virtual cemetery.¹⁵⁰ Few of these companies would qualify as "professional" occupations, and many would require the would-be entrepreneur to produce or sell goods or services.¹⁵¹

D. Humanizing the Way We Live: New Urbanism and the Costs of Sprawl

The fourth reason to reevaluate the restrictions on home businesses is that encouraging people to work from home may help alleviate some of the negative consequences of American zoning laws. A growing number of scholars, planners, and architects have come to conclude that zoning laws mistakenly enshrine the "home" in a hermetically sealed unreality bubble. Building upon works of Jane Jacobs, especially *The Death and Life of Great American Cities*,¹⁵² these "new urbanist" critics contend that we humans should be permitted to live amidst the rough and tumble of the "real world"—and, indeed, that we would benefit from the experience of it.¹⁵³ The new urbanists contend that life

150. See GIELGUN, *supra* note 149, at 93-288.

151. See, e.g., SMALL BUSINESSES VENTURE ONLINE, *supra* note 142, at 6 (finding that 65% of small businesses used the Internet to sell goods and services); *Small Businesses Dream of the Web*, USA TODAY, June 8, 2000, at 18 (reporting survey finding that more than half of all small business owners who have yet to establish a website would like to use the Internet to sell products or services), available in LEXIS, News Library, USA Today File.

152. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

153. See, e.g., Frug, *supra* note 70, at 1089-94 (describing the "new urbanism"). James Howard Kunstler sums up the "new urbanists" philosophy as follows:

[Zoning law's] chief characteristics are the strict separation of human activities After all, it's called *zoning* because the basic idea is that every activity demands a separate zone of its very own. . . .

....

in the exclusively residential zone is stultifying, and that it is stultifying precisely because it is exclusively residential. They champion "mixed-use" neighborhoods, where homes are situated within walking distance of stores, restaurants, and parks.¹⁵⁴ Seizing upon Jacobs's insight that American land use planning goes to far,¹⁵⁵ they argue that, while it is one thing to segregate industrial smokestacks and meat-packing plants from residential neighborhoods, it is quite another to "zone" out the corner store, which enhances, rather than corrupts, a neighborhood. It gives older children a place to buy candy and ice cream on lazy summer afternoons and harried moms and dads a place to pick up a gallon of milk without having to drive miles to the nearest supermarket. But most of all, the corner store gives people a place to go, on foot, within their own neighborhood, thus ensuring that people will be outside, mingling amongst each other rather than sitting in their family rooms watching endless hours of television.¹⁵⁶ As Philip Langdon observes:

The tavern, the cafe, the coffee shop, the neighborhood store—these and other potential gathering places have been zoned out of residential areas. Few are the neighborhood places where people can go in hopes of striking up a conversation As informal gathering places have been banished, many opportunities for making friendships and pursuing common interests have disappeared.¹⁵⁷

It soon becomes obvious that the model of the human habitat dictated by zoning is a formless, soulless, centerless, demoralizing mess. It bankrupts families and townships. It causes mental illness. It disables whole classes of decent, normal citizens. It ruins the air we breathe. It corrupts and deadens our spirits.

JAMES HOWARD KUNTSLER, *HOME FROM NOWHERE* 110-12 (1996).

154. The term "mixed-use"—a favorite of the new urbanists—is also attributable to Jacobs, who wrote of it as one of the conditions for vibrant city life. See JACOBS, *supra* note 152, at 152-77, 222-40.

155. Unlike Jacobs, however, who expressed profound skepticism about the entire enterprise of land use "planning," the new urbanists would replace the current set of rules with their own. See, e.g., KUNTSLER, *supra* note 153, at 135 (arguing in favor of authoritarian controls on development because "[a]uthorities can exist without being despotic"); Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1114 (1996) (expressing concern that new urbanists would replace one system of land use rules with another).

156. For a discussion of the benefits of a more centralized environment, see KUNTSLER, *supra* note 153, at 52-57.

157. PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB* 15

The new urbanists' "ideal" is the pre-World War II small American city: a place with a "traditional" main street and city center.¹⁵⁸ Their nightmare is the post-1950s suburb: the world of strip malls and megastores, cul-de-sacs, and drive-thru restaurants. It is therefore not surprising that, while the new urbanists advocate "mixing" residences and commercial enterprises, they do not spend much time championing home businesses. Home businesses will not transform "monoculture tract developments of cookie-cutter bunkers on half-acre lots in far-flung suburbs"¹⁵⁹ into the tree-lined streets of quaint shops and rowhouses that characterize places like Old Town Alexandria, Virginia.¹⁶⁰ To the contrary, amending zoning laws to authorize home businesses will simply permit people to work in the suburban tract homes that the new urbanists deplore—there may be more dot-coms, but not more corner stores.¹⁶¹

While legal reforms that permit home business might not affect the radical overhaul of American land use patterns advocated by the new urbanists, they could help cure some of the related ills that these critics identify. Consider, for example, the new urbanists' complaint about the social isolation of modern suburbia. The legal segregation of commercial and residential uses of property contributes to this isolation not only by depriving residents of places to gather within their neighborhoods, but also by virtually guaranteeing that they rarely will *be* in their neighborhoods. Especially because of the integration of women into the workforce, the physical separation of work and home means that many suburban neighborhoods are *empty* during the day. Moms and dads go to work; kids go to school or childcare centers. Permitting people to work at home would not only enable harried parents to fulfill their family responsibilities,¹⁶² but it also would guarantee that they were home *during the day* to meet one another.

(1994).

158. See ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 10-11 (2000) (praising prewar patterns of development).

159. JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* 147 (1998).

160. See DUANY ET AL., *supra* note 158, at 15-18 (praising Old Town Alexandria).

161. Cf. Jeffery S. Hampton, *County to Reduce Commercial Zoning; New Amendment Designed to Slow Strip Development on Tourist Roads*, VIRGINIAN-PILOT (Norfolk, Va.), Jan. 8, 1999, at B1 (discussing proposal to permit home businesses to reduce demand for strip mall development), available in LEXIS, News Library, Virginian-Pilot File.

162. See *supra* notes 102-12 and accompanying text.

Similarly, working at home could help alleviate the negative externalities of another ugly stepchild of American zoning laws, namely, suburban sprawl.¹⁶³ The serious quality-of-life consequences caused by the current pattern of suburban development extend beyond the loss of "place" decried by new urbanists.¹⁶⁴ For example, although Americans consistently indicate (both in public opinion surveys and by their residential choices) that they are willing to travel long distances to work in order to live in suburban communities,¹⁶⁵ the long commutes associated with the current sprawling patterns of development contribute to suburbanites' social isolation.¹⁶⁶ Residents who must

163. See COUNCIL ON ENVTL. QUALITY, *THE COSTS OF SPRAWL: DETAILED COST ANALYSIS* 26-27 (1974) (noting the concern that exclusionary zoning contributes to sprawl); FISCHEL, *supra* note 25, at 263-64 (identifying suburban sprawl as "zoning's major deleterious effect"); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1149 (1996) (discussing regional "tragedy of the commons" created by local zoning decisions); Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159, 161-62 (1997) (identifying zoning law as cause of sprawl); Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 137 (1999) ("Sprawl occurs, in part, because local governments in the United States encourage this form of development via zoning and subdivision ordinances that, in turn, reflect the desires of the citizens."); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 494-96 (1994) (discussing connection between Euclidean zoning and suburban growth patterns).

164. See Burchell, *supra* note 163, at 169.

165. See, e.g., ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* 16-17 (1992); see also Been, *supra* note 155, at 1110 (discussing economic reasons that Americans prefer the suburbs); Burchell & Shad, *supra* note 163, at 138 ("Sprawl is so well-accepted by the public that the AAA-rated locations for both residential and nonresidential development are increasingly farther out rather than closer in, and more, rather than less, segregated by type of land use."); Buzbee, *supra* note 71, at 65-66 ("Many Americans recently surveyed about sprawl, however, confirmed market trends that indicate many, if not most, citizens favor new residential developments with cul de sacs set at a substantial distance from retail markets and mass transit."); Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, J. OF AM. PLAN. ASS'N, Winter 1997, at 95, 96-97 ("Low density settlement is the overwhelming choice for residential living.").

166. See LANGDON, *supra* note 157, at 14 (discussing connection between long commutes and the loss of community); PETER NEWMAN & JEFFREY KENWORTHY, *SUSTAINABILITY AND CITIES: OVERCOMING AUTOMOBILE DEPENDENCE* 22 (1999) (noting the "isolationist" character of many modern cities and asserting that reducing traffic would improve community development and sustainability); Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 171-72 (1998) (discussing "wasted time" and other drawbacks to long commutes); cf. Tirza S. Wahrman, *Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act to Improve Air Quality and Reduce Vehicle Miles Traveled*, 8 DUKE ENVTL. L. & POL'Y F. 181, 184-88 (1998) (discussing

spend hours each week commuting to work arrive home from work too late and too exhausted to spend time with their families, let alone to socialize with neighbors.¹⁶⁷

Furthermore, in sprawling suburban neighborhoods, the low density of residential developments virtually eliminates the possibility of mass-transit commuting.¹⁶⁸ As a result, most suburbanites drive to work.¹⁶⁹ And, they usually drive alone, which means—in this era of dual-career couples—that many families have two cars on the road at the same times each day.¹⁷⁰ The result is the terrible traffic congestion that suburban residents consistently rank as their “most serious environmental problem.”¹⁷¹ They are correct, and for more than one reason. Traffic congestion not only eats up residents’ precious free time¹⁷² and increases their level of stress,¹⁷³ it is also the major culprit when cities find themselves unable to attain federal Clean Air Act standards.¹⁷⁴

environmental impacts of America’s reliance on cars in the suburbs).

167. See Frug, *supra* note 70, at 1096 (discussing negative impact of sprawl on women); Oren, *supra* note 166, at 171 (discussing quality-of-life consequences of sprawl).

168. See DOWNS, *supra* note 165, at 19; Briffault, *supra* note 163, at 1135; Robert Fishman, *America’s New City: Megalopolis Unbound*, WILSON Q., Winter 1990, at 24, 33-36; Oren, *supra* note 166, at 169-70.

169. See Oren, *supra* note 166, at 169-70.

170. See FEDERAL HIGHWAY ADMIN., U.S. DEPT OF TRANSP., SUMMARY OF TRAVEL TRENDS: 1990 NATIONWIDE PERSONAL TRANSPORTATION SURVEY 21 (1992) (noting that the average vehicle occupancy for trips to work dropped from 1.3 passengers in 1977 to 1.1 in 1990), available at <http://www-cta.ornl.gov/npts/1990/doc/travelTrends.pdf>; PATRICIA S. HU & JENNIFER R. YOUNG, U.S. DEPT OF TRANSP., SUMMARY OF TRAVEL TRENDS: 1995 NATIONWIDE PERSONAL TRANSPORTATION SURVEY 40 (1999) (indicating that 79.6% of workers reported that they “usually drive alone”), available at <http://www-cta.ornl.gov/npts/1995/Doc/publications.html>.

171. DOWNS, *supra* note 165, at 1.

172. One well-known economist noted that in 1995, “Americans lost more than eight billion hours to traffic delays, at a total cost of more than \$80 billion—mainly in the form of wasted time . . .” Paul R. Krugman, *The Tax-Reform Obsession*, N.Y. TIMES, Apr. 7, 1996, § 6 (Magazine), at 36, 37. Empirical evidence suggests that the probability of working from home increases with the costs of commuting. See Edwards & Fields-Hendrey, *supra* note 8, at 33 (noting that workers living in rural areas “where commuting times to onsite work are likely to be longer than in urban areas” are more likely to work from home).

173. See generally Daniel Stokols et al., *Traffic Congestion, Type A Behavior, and Stress*, 63 J. APPLIED PSYCHOL. 467 (1978) (discussing results of experiment measuring commuter response to traffic impedance); see also *Stress and Absenteeism; the Hidden Costs of Commuting*, BUS. WIRE, Feb. 4, 1992 (reporting that “‘high-impedance’ commuting can . . . affect the driver’s tolerance for frustration, memory and mood” and, consequently, lessen worker productivity), available in LEXIS, News Library, Business Wire File.

174. See Oren, *supra* note 166, at 150-161; see also Arnold W. Reitze, Jr., *A Century of Air*

Not surprisingly, therefore, officials at the federal and state level have begun to incorporate policies promoting work-at-home arrangements into efforts to reduce emissions and boost compliance with environmental laws.¹⁷⁵ Many of these measures encourage telecommuting, which is the work-at-home arrangement that perhaps is least affected by zoning laws.¹⁷⁶ Increasing the number of home-based businesses, however, holds even more promise of reducing automobile emissions: on average, telecommuters work only nine days per month at home, guaranteeing that many of them will be commuting to work

Pollution Control Law: What's Worked; What's Failed; What Might Work, 21 ENVTL. L. 1549, 1572 (1991) (arguing that the American system of land use laws which segregate "[p]eoples' homes . . . from their work, shopping, and play" leads to suburban sprawl and, consequently, concomitant dependence upon the automobile and air pollution).

175. For examples of legislative efforts in the past year see S. 2447, 106th Cong. § 1 (2000) (proposing National Centers for Distance Working); H.R. 2084, 106th Cong. § 1 (1999) (enacted) (establishing Department of Transportation pilot program to encourage telecommuting as a means of reducing emissions); H.R. 2490, 106th Cong., § 1 (1999) (enacted) (appropriating funds for "flexplace telecommuting centers"); H.R. 3500, 106th Cong. § 3(a) (1999) (proposing "a pilot program to raise awareness about telecommuting among small business employers"); 145 CONG. REC. E.1589 (1999) (statement of Rep. Wolf on National Telecommuting and Air Quality Act, H.R. 2556, 106th Cong. § 1 (1999)) ("Mr. Speaker, traffic congestion and lack of mobility threatens not only our nation's prosperity, but quality of life and the family unit. That is why today, I am introducing the 'National Telecommuting and Air Quality Act,' a bill designed to reduce both air pollution and traffic congestion."); H.B. 1051, 62d Gen. Assembly, 2d Reg. Sess. (Colo. 2000) (providing an income tax credit for employers that allow telecommuting); S.B. 305, 145th Gen. Assembly, Reg. Sess. (Ga. 2000) (requiring state agencies to ensure that at least 10% of their workforce telecommutes), available at <http://www.ganet.state.ga.us/services/leg/ShowBill.cgi?year=1999&filename=1999/SB305>; L.R. 210, 96th Leg., 1st Reg. Sess. (Neb. 1999) (initiating study of feasibility of telecommuting in Nebraska); see also Michael Cabanatuan, *Workers Try New Route—Telecommute; Traffic Provides Incentive for Working from Home*, S.F. CHRON., Sept. 11, 1997, at A15 (discussing progression of attitudes in favor of telecommuting), available in LEXIS, News Library, San Francisco Chronicle File; Carol Kleiman, *Telecommuting Attitudes Appear to Be on the Move*, CHI. TRIB., Apr. 11, 2000, at B1 (discussing perceived benefits of telecommuting), available in LEXIS, News Library, Chicago Tribune File; Karen Lee, *Governments Back Telework to Support Public Agenda*, EMPL. BENEFIT NEWS, June 1, 2000 (reporting efforts of Washington, D.C. area officials to promote telecommuting), available in LEXIS, News Library, Employee Benefit News File; Mary Jo Pitzl, *Pollution Busters Stage Telecommuting Event; Officials Want to Avert Ozone Emergency*, ARIZ. REPUBLIC, Apr. 20, 1999, at B1 (describing Telework Greater Phoenix Day), available in LEXIS, News Library, Arizona Republic File.

176. See *supra* note 146 and accompanying text.

most of the time.¹⁷⁷ Almost by definition, on the other hand, individuals who own home-based businesses never have to commute to work.¹⁷⁸

E. People Are Already Doing It

Finally, the fact that many people who wish to work at home simply open up shop despite the restrictions imposed by zoning codes may signal that these rules have become outdated. Indeed, the rapid proliferation of home businesses should be taken, at the very least, as *prima facie* evidence that large numbers of people—perhaps millions of people—are operating in derogation of legal prohibitions against working at home. Many of them undoubtedly either are ignorant of zoning rules that restrict their operations, or believe, probably correctly, that they can avoid detection by local zoning authorities if they circumscribe their operations.¹⁷⁹

This course of action is not without its down sides, the main one being detection either by local officials or by tattle-tale neighbors who may initiate an enforcement action against a nonconforming

177. See *WORK AT HOME IN 1997*, *supra* note 138, at 1 (finding that “[w]age and salary workers who were paid for working at home averaged nearly 15 hours per week at home”). According to Anthony Downs, “telecommuting has to be common to make any significant impact” on traffic congestion or automobile emissions. *DOWNES*, *supra* note 165, at 62. For example, 10% of workers working at home one day per week would result in a 0.86% reduction in the number of morning peak-hour trips; if the same number worked at home half time, the reduction in peak morning trips would increase to 2.16%. See *id.* at 63.

178. See *PRATT*, *supra* note 9, at 51 (finding that individuals who own home-based businesses work an average of 35 hours per week at home); *WORK AT HOME IN 1997*, *supra* note 138, at 1 (estimating that “[w]orkers in home-based businesses worked 23 hours per week”); see also *Calem*, *supra* note 115, at 3-1 (discussing interviews with telecommuters and noting that “[t]hose who had endured long commutes talked of the time saved”).

179. Zoning enforcement is notoriously lax and frequently complaint driven. See, e.g., *PLATT*, *supra* note 25, at 296 (“Zoning has particularly been criticized for procedural inadequacies: lax enforcement, favoritism, lack of consistency with planning, and excessive rigidity in some cases and undue flexibility in others.”); Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 *CORNELL L. REV.* 1, 1 (1985) (“The enforcement of land use restraints . . . is often haphazard. Municipalities usually do not check a property for ordinance and code violations unless someone files a complaint or requests an inspection.”); Richard L. Wexler, *“A Zoning Ordinance Is No Better Than its Administration”—A Platitude Proved: The Practices and Procedures of Chicago’s Zoning Board of Appeals*, 1 *J. MARSHALL J. PRAC. & PROC.* 74, 74-75 (1967) (stating that “the variations and the administrative procedures for [zoning ordinance] implementation have reached a point of abuse that endangers the very system they were designed to protect”).

business.¹⁸⁰ While it is impossible to determine how frequently the gamble pays off, it is clear that municipal authorities do not always turn a blind eye to illegal home businesses. Since 1990, a number of reported cases have chronicled disputes between zoning authorities and home entrepreneurs.¹⁸¹ Although these cases obviously underrepresent the number of actual enforcement actions taken against individuals who work from home, they do highlight the significant risk associated with flouting the law.¹⁸² Put simply, individuals who choose to work at home must face the prospect that they might be forced to close their businesses on a moment's notice.¹⁸³ They also risk liability for civil or criminal sanctions.¹⁸⁴

This widespread defiance of zoning laws itself suggests that the rules governing home businesses may be candidates for reform. Not only is the precarious situation of illegal home business suboptimal for those acting in defiance of the law, but laws that force large numbers of people to operate in the underground economy can impede other

180. See *City of Fairfield v. Courtney*, No. CA92-11-226, 1993 WL 199310, at *1 (Ohio Ct. App. June 14, 1993) (regarding case in which neighbors reported that resident was operating a taxi service from home); *Groninger v. Aumiller*, 644 A.2d 1266, 1266 (Pa. Super. 1994) ("For nearly five years now, Margaret and Donald Groninger have been trying to prevent their neighbors Thomas and Barbara Aumiller from running a contracting business out of their model home"); see also BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 31 (1972) (finding that complaints about home businesses represented the largest category of reported zoning violations in Houston suburbs); Amey Stone, *A Zoning Nightmare on Elm Street: Home Business? The Neighbors May Raise Hell*, BUS. WK., Mar. 18, 1996, at ENT32 (stating that neighbors are most likely to report zoning violations by home businesses, and suggesting preemptive strategies "to ward off zoning problems"), available in LEXIS, News Library, Business Week File.

181. See *supra* note 22.

182. Occasional press reports of enforcement efforts also suggest that the risk is not nonexistent. See *supra* notes 23-24.

183. See cases cited *supra* note 22.

184. See *State v. Trachtman*, 947 P.2d 905 (Ariz. Ct. App. 1997) (rejecting appeal from convictions for violating zoning code prohibiting home business); *Robertson v. Rodriguez*, 42 Cal. Rptr. 2d 464 (Cal. Ct. App. 1995) (concerning libel case turning on whether member of the Cudahy, California City Council was criminally fined for illegally operating a business from his home); *Town of Falmouth v. Long*, 578 A.2d 1168 (Me. 1990) (allowing \$2500 fine against defendant for employing unrelated individuals in home business); *Johnston v. Upper Macungie Township*, 638 A.2d 408 (Pa. Commw. Ct. 1994) (concerning citation for operation of antique book business from home).

legitimate fiscal¹⁸⁵ and regulatory¹⁸⁶ goals of the government. As Richard Epstein has observed:

The underground economy is a challenge to the legal order by those who refuse to obey its commands. The simple but persistent question is: What alternative to the status quo should we consider? One path asks whether further coercion is required to make violators comply with the law. The other path asks whether it is best to relax the norms, so that activities now underground will rise to the surface and receive the protection of the law.¹⁸⁷

If favorable press coverage on home businesses is any indication of popular sentiment, many people indeed take a “nudge-nudge, wink-wink”¹⁸⁸ approach to the issue, viewing illegal home businesses as “harmless” (to the extent that they have any awareness of the laws restricting them). This sentiment suggests that relaxation of the rules, rather than increased enforcement, might be an appropriate course of action.

IV. A NOTE ON EXTERNALITIES AND NEIGHBORHOOD CHARACTER

Although all of these factors suggest that current zoning rules are not well equipped to address the modern economic forces leading

185. See, e.g., David Cay Johnston, *Giving at the Home Office; Municipalities Set New Charges for In-House Businesses*, N.Y. TIMES, Dec. 19, 1997, at D1 (discussing municipal efforts to tax home businesses); Fran Spielman, *Home-Based Businesses Ignore City License Law*, CHI. SUN-TIMES, Aug. 29, 1995, at News 1 (discussing refusal of illegal home businesses to comply with Chicago's licensing requirement), available in LEXIS, News Library, Chicago Sun-Times File. See generally FRANK A. COWELL, *CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION* (1990) (discussing tax evasion by underground businesses).

186. For example, some labor experts worry that home-based workers are vulnerable to exploitation, a concern that will be more difficult to police if home businesses have additional incentives to conceal their operations. See, e.g., Edwards & Field-Hendrey, *supra* note 8, at 27 (discussing debate about exploitation of home-based workers). Similarly, home child care centers that conceal operations to avoid detection by zoning officials may also evade licensing and oversight requirements. See, e.g., *Protecting Children, Neighborhoods: Chandler Child-care Mess*, ARIZ. REPUBLIC, June 20, 2000, at Community 4, available in LEXIS, News Library, Arizona Republic File.

187. Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2158 (1994) (footnote omitted).

188. *Monty Python's Flying Circus: Nudge Nudge, Wink Wink* (BBC television broadcast, 1969).

people to work from home, many residents—including perhaps many who wish to work from home—probably have some concerns about introducing large numbers of home businesses into residential neighborhoods.

While home businesses could disrupt their neighbors' lives, there are a number of reasons to believe that their negative externalities could be kept to a minimum. For example, as Professor Ellickson has argued, the externalities policed by zoning tend to be "localized" harms,¹⁸⁹ which could be addressed primarily through good manners. There is, of course, every reason to believe that most neighbors have good manners and would try to operate their home businesses in a responsible, neighborly manner. Still, it is hardly surprising that zoning enforcement actions against individuals who work from home are most frequently initiated by a neighbor's complaint about home-business externalities, such as customer visits that increase traffic or delivery trucks that wake napping toddlers.¹⁹⁰

Furthermore, zoning laws have long aimed to preserve an exclusively domestic sphere of human activity, freed from the "profanities of work and commerce."¹⁹¹ As a result, "[d]rafters of zoning ordinances are equally preoccupied with criteria that will maintain the [neighborhood's] 'single-family character' . . . , a concern especially mobilized by the zoning category of 'home occupation,' for 'home' and 'work' are two distinct categories whose mixing requires the utmost forethought, when not entirely prohibited."¹⁹² Less stringent regulations on working from home may undermine this scheme: If

189. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973).

190. See, e.g., Eric C. Evarts, *Home Zone: New Approaches to Old Laws*, CHRISTIAN SCI. MONITOR, Nov. 24, 1997, at B4 (noting that most complaints against home businesses come from neighbors), available in LEXIS, News Library, Christian Science Monitor File; *Letters from the People: Operating Business At Home*, ST. LOUIS POST-DISPATCH, Sept. 24, 1995, at 2B (publishing letter defending a home-based art teacher against complaints by neighbors), available in LEXIS, News Library, St. Louis Post-Dispatch File; Stone, *supra* note 180, at ENT 32; Janet C. Wetzel, *Home Business Divides Neighbors; Zoning Board Set to Decide Dispute Today*, CIN. ENQUIRER, Apr. 30, 1996, at B3 (discussing dispute over whether to grant variance for home auto repair shop), available in LEXIS, News Library, Cincinnati Enquirer File; see also *Groninger v. Aumiller*, 644 A.2d 1266 (Pa. Super. 1994) (affirming lower court's nullification of enforcement action initiated by neighbors against home-contracting business).

191. PERIN, *supra* note 20, at 116-17.

192. *Id.* at 91.

officials give one home business the green light, it may operate completely unobtrusively. Neighbors may not even notice its presence. If a city permits ten or twenty home businesses to operate in close proximity to one another, however, neighbors will undoubtedly notice. Even if each home business carefully circumscribes its operations to minimize externalities, the combined impact of the many residents' decisions to bring commerce into their living rooms may eventually erode the purely residential character of the neighborhood. Over time, it may become less of the pastoral "ideal" envisioned by the early proponents of zoning.

These concerns about negative externalities and neighborhood character may cause local legislators to pause before permitting the categories of "home" and "work" to mix. The new urbanists' response to this skittishness about home businesses—that most exclusively residential suburban neighborhoods do not have a character worth preserving¹⁹³—is both simplistic and elitist. The intellectuals who advocate "new urbanism" may not like the American residential subdivision, but apparently many Americans do.¹⁹⁴ Thus, to the extent that Americans' residential choices are motivated by genuine preferences for the suburban lifestyle, abandoning a central tenet of zoning laws—the strict separation of work and home—may be unfair to current residents. After all, residents of planned and zoned suburban communities chose to live there, fully aware that they were buying into an exclusively residential community and likely believing that the neighborhood would stay that way.¹⁹⁵ Permitting home businesses may undermine homeowners' expectations. One can imagine resulting complaints like, "We bought this house so that the kids could play kickball in the cul-de-sac. Now the traffic keeps them inside fighting over who is up next on Nintendo."

193. See *supra* note 154-61 and accompanying text.

194. See *supra* note 165 and accompanying text.

195. See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 525-28 (1991) (discussing factors involved in families' decisions about where to live); Buzbee, *supra* note 71, at 64-69 (discussing causes of sprawl); see also Fred Barnes, *Suburban Beauty; Why Sprawl Works*, WKLY. STANDARD, May 22, 2000, at 27-30 (reviewing recent books on the suburban sprawl debate and asserting that most people prefer quiet, low-density neighborhoods), available in LEXIS, News Library, Weekly Standard File. But see ROBERTA BRANDES GRATZ & NORMAN MINTZ, CITIES BACK FROM THE EDGE: NEW LIFE FOR DOWNTOWN 147-49 (1998) (noting that historic urban neighborhoods are the most expensive and desirable places to live).

Furthermore, zoning law's exclusion of commercial enterprises from residential neighborhoods has long been perceived as a cheap and efficient form of property-value insurance.¹⁹⁶ As the California Supreme Court observed over seventy-five years ago when it upheld San Francisco's first zoning ordinance, "It is manifest that the introduction of any form of business or industrial use into strictly uniform home districts operates, in a measure at least, to lower the value and depreciate the desirability of surrounding property for residential purposes."¹⁹⁷ If these presuppositions about zoning laws are correct, local officials rightly would find cause for concern in any proposal to eliminate restrictions upon working at home. If the strict segregation of "home" and "work" enshrined in current land use regulations preserves property values, its elimination might depress them, again undermining residents legitimate economic expectations.¹⁹⁸

These arguments have led some local officials to respond to the home business dilemma by tightening—rather than relaxing—zoning restrictions on home businesses.¹⁹⁹ Which path represents the appropriate response to the fact that increasing numbers of people are working from home depends on the answer to at least two distinct questions. *First*, how much would a more permissive zoning regime affect neighborhood character? While there is no question that zoning changes will, at least in some cases, lead to changes in neighborhood character, the extent of the change depends in large part on how much current zoning prohibitions deter people from working at home. If zoning prohibitions are keeping large numbers of law-abiding citizens from working at home, then liberalizing the zoning rules could have the effect of opening the floodgates—freeing thousands (perhaps

196. See, e.g., Baker, *supra* note 58, at 169 ("Often zoning increases the value of the property concerned. To illustrate—if a residence district is set aside by a zoning regulation, the exclusion of business usually has the effect of increasing the value of the property for residential purposes.").

197. *Fourcade v. City and County of San Francisco*, 238 P. 934, 937 (Cal. 1925); see also Robert H. Whitten, *Zoning and Living Conditions*, 13 PROC. NAT'L CONF. ON CITY PLAN. 22, 25 (1921) ("As soon as the confidence of the home owner in the maintenance of the character of the neighborhood is broken down through the coming of the store or of the apartment, his civic pride and his economic interest in the permanent welfare of the section declines.").

198. See WRIGHT, *supra* note 36, at 213-14 (noting that one of the original motivations in zoning was to protect individuals' property investments); see also PERIN, *supra* note 20, at 150 (arguing that zoning provides a "surer hedge against loss than going to court against a detrimental neighbor").

199. See *supra* note 24 and accompanying text.

millions) of people to fulfill their most sincere desire to work at home—and leading to radical changes in neighborhood character. If, on the other hand, most people who want to work at home already are doing so, then liberalizing zoning laws will only permit existing illegal home businesses to rise out of the underground economy.

It is difficult to measure the deterrent effect of zoning rules governing home business, but the demographic evidence discussed above suggests that it may not be overwhelming. The fact that millions of people who already work from home are not being deterred by zoning rules suggests that less restrictive ground rules may not result in a deluge of new home businesses. Of course, even if new rules will not lead to large numbers of *new* home businesses, legalizing existing home businesses may have some incremental effects on neighborhood character, especially because individuals who are operating in defiance of the law likely take care to circumscribe their operations. Detection by the authorities carries a heavy price—civil and perhaps criminal penalties, not to mention the loss of a livelihood.²⁰⁰ Thus, the effect of a more lenient zoning regime will likely be greater if the people who work from home intentionally are defying the law rather than simply ignorant of it.

Finally, while it is impossible to know how many of the people who currently work from home are ignorant of, rather than intentionally defying, zoning proscriptions—the available evidence is purely anecdotal²⁰¹—it is important to note that zoning laws are not the only rules that guard neighborhood character against commercial intrusions. Increasing numbers of Americans live in neighborhoods where land use restrictions are imposed not only by zoning laws, but also by private covenants subject to enforcement by residential neighborhood associations.²⁰² Covenants that preclude residents from

200. See *supra* note 183 and accompanying text.

201. See, e.g., Bennett, *supra* note 21, at 10 (discussing efforts of one business to avoid detection by zoning authorities); Spielman, *supra* note 185 (discussing refusal of illegal home businesses to comply with Chicago's licensing requirement).

202. See COMMUNITY ASSOCIATIONS FACTBOOK 13 (CLIFFORD J. TREESE ed., 1993) (estimating that, in 1992, there were 150,000 community associations governing 32 million people); ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 5 (1992) (noting that, by the end of the 1980s, more than 30 million Americans were subject to governance by over 130,000 residential community associations and predicting that the number of such associations would increase to 225,000 by the year 2000).

working from their homes are not at all unusual.²⁰³ Changes in zoning laws will not alter the force of these restrictions, which may serve as a more effective deterrent than zoning laws, especially when enforced by an active homeowner's association. To the extent that some residents strongly desire a "commercial free" neighborhood—as undoubtedly some will—these covenants offer a "private" check on the legal reforms proposed in this Article.²⁰⁴

The *second* question relevant to the "neighborhood character" objection to my critique of current zoning restrictions on home businesses is this: How much do people care? Or, put more gently, how many Americans might be willing to trade a little residential tranquility for more regulatory flexibility? Again, the evidence on this question appears mixed. While many Americans apparently consider a single-family home in an exclusively residential neighborhood the "ideal" place to live,²⁰⁵ presumably the status quo represents a less than ideal situation for the millions of people who already work from home. Furthermore, the available demographic evidence suggests that more people may come to view working at home as an attractive alternative to traditional employment relationships in the near future. As they do, more and more residents may come to view the exclusion

203. See Rosenberry, *supra* note 18, at 456 (discussing judicial enforcement of restrictive covenants against home businesses); see also Maryann Haggerty, *It's Not Always Home Sweet Home: Entrepreneurs Working Out of the House Find Resistance in Some Neighborhoods*, WASH. POST, May 2, 1998, at G1 (discussing homeowner association enforcement of covenants prohibiting home businesses).

204. See, e.g., Clayton P. Gillette, *Courts, Covenants and Communities*, 61 U. CHI. L. REV. 1375, 1375 (1994) (suggesting that a system of covenants enforced by residential associations "allow[s] individuals with common preferences to gravitate to a common location where they can pursue their conception of the good life"). This observation should not be read as an unmitigated endorsement of such a system of private government, which certainly has its critics and problems. See, e.g., *id.* at 1375-76 (describing residential associations as both a "blessing" and a "curse"). Nor am I unsympathetic to requiring residents to "buy" their way into exclusive neighborhoods, which works to the detriment of lower-income individuals. See, e.g., Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993) (arguing for exclusionary zoning to protect and enhance property values in low-income areas). On the other hand, lower-income residents may value the right to work from home more than more wealthy ones. But see ROBERT D. BULLARD, *INVISIBLE HOUSTON: THE BLACK EXPERIENCE IN BOOM AND BUST* 63-70 (1987) (arguing that Houston's lack of zoning led to incursions of commercial enterprises into black neighborhoods, which in turn reduced property values).

205. See Buzbee, *supra* note 71, at 65-66 (discussing public opinion polls indicating preference for "suburban sprawl" type development); see also *supra* notes 194-95 and accompanying text (noting that suburban living is indeed popular).

of all commerce from residential zones as more of a detriment than a benefit. If this shift occurs (or if it has already occurred), the preservation of an *exclusively* residential neighborhood character will become less of a concern for local officials. Not only is it possible that their constituents may come to view a "home-business friendly" neighborhood as superior to a pristine, commercial-free one, but changes in zoning rules that permit more home businesses may prove to pose little threat to property values. To the contrary, some people may be willing to pay *more* to live in a neighborhood where they are able to work from home without threat of legal sanction.²⁰⁶ Thus, the literature on "fiscal zoning" would predict that some municipalities may choose to adopt more lenient home business rules to attract home purchasers with these preferences.²⁰⁷

V. BALANCING THE GOOD AND BAD: RETHINKING THE RESTRICTIONS ON HOME BUSINESS

The fact many Americans are choosing to work at home and that many more will likely choose to do so in the future represents a

206. While the empirical research on the connection between zoning rules and property values is mixed, it contains some support for this conclusion. A number of studies have found that discordant uses do not necessarily decrease property values; at times, they increase them. See John P. Crecine et al., *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J.L. & ECON. 79, 90-93 (1967) (finding that the effect of externalities caused by discordant uses on property values in Pittsburgh varied by neighborhood); Steven M. Maser et al., *The Effects of Zoning and Externalities on the Price of Land: An Empirical Analysis of Monroe County, New York*, 20 J.L. & ECON. 111, 124, 129 (1977) (finding no price effects attributable to zoning and noting that "[p]resumably the reason external costs are not observed to be capitalized into the value of the land is that there exists a sufficient diversity of tastes among potential buyers; that is to say, there are buyers who are indifferent to the offensive use (perhaps even value it)"). But cf. FISCHER, *supra* note 25, at 236-41 (arguing that empirical studies consistently have underestimated importance of negative externalities and effect of zoning on housing costs); Ronald N. Lafferty & H.E. Frech III, *Community Environment and the Market Value of Single-Family Homes: The Effect of the Dispersion of Land Uses*, 21 J.L. & ECON. 381, 382 (1978) (finding that dispersion of nonsingle-family uses lowered housing prices); William J. Stull, *Community Environment, Zoning, and the Market Value of Single-Family Homes*, 18 J.L. & ECON. 535, 551 (1975) (finding that "homeowners attached the highest value to communities which were predominantly single-family but which also contained a small amount of commercial activity").

207. See generally Been, *supra* note 195, at 514-18 (reviewing literature demonstrating that people "vote with their feet" to select communities with packages of land use rules and services that they desire).

remarkable reversal of the nearly two-century-old pattern of leaving the home to go to work. It also makes the regulatory status quo an uneasy one, suggesting that local officials will find it difficult to postpone confronting the home business dilemma forever. When they do confront it, many will decide—for the reasons set forth above and a myriad of others—that zoning laws discouraging people from working at home simply do not mesh with modern reality: they zone out dot-coms, keep working moms away from their kids all day, impede the commendable efforts of low-income individuals to earn an honest living, and contribute to the degradation of the quality of our lives and of our environment.

Nonetheless, it is clear that liberalizing restrictions on home businesses is hardly a cost-free endeavor. Accounts in the popular press suggest that zoning enforcement actions against home businesses generally have been triggered by disgruntled neighbors' complaints²⁰⁸ and that efforts to liberalize restrictions on home-based businesses have generated opposition.²⁰⁹ In both cases, residents express concern that the right to work at home can lead to significant disruptions in their daily lives, and, as discussed above, the steady erosion of neighborhood character. These are reasonable concerns that

208. See *supra* notes 23-24 and accompanying text.

209. See Liz Atwood, *Home-business Proposal Meets Opposition; Community Leaders, PTA Fight Attempt to Ease Restrictions*, BALT. SUN, Apr. 17, 1998, at 3B, available in LEXIS, News Library, Baltimore Sun File; Paul Carroll, *West Seneca Gives Cool Reception to Home-based Occupations*, BUFF. NEWS, July 11, 1995, at 5B, available in LEXIS, News Library, Buffalo News File; Nancy Fischer, *Board Tightens Regulations on Businesses Run from Homes*, BUFF. NEWS, Apr. 22, 1998, at 5B, available in LEXIS, News Library, Buffalo News File; *Home Offices Can Create Problems*, TAMPA TRIB., May 16, 1997, at Bus. & Fin. 7, available in LEXIS, News Library, Tampa Tribune File; Devi Sen Laskar, *Day Care Provider Runs into Rules Roadblock*, ATLANTA J.-CONST., July 4, 1996, at 4I, available in LEXIS, News Library, Atlanta Journal and Constitution File; Hugo Martin, *Council Clash Due on Business Proposal; Zoning: Bernson Opposes Loosening Rules Governing Home-based Entrepreneurs, While Chick Supports It*, L.A. TIMES, Apr. 13, 1996, at B5, available in LEXIS, News Library, Los Angeles Times File; John Pope, *Occult Businesses Must Obtain Permits*, L.A. TIMES, June 2, 1998, at B3, available in LEXIS, News Library, Los Angeles Times File; Mark Shallcross, *Crestwood Tree Service Denied Conditional-Use Permit for Home Business: Too Many Off-site Employees; Board Suggests Company Apply for Zoning Change*, COURIER-J. (Louisville, Ky.), Dec. 6, 1995, at 3N, available in LEXIS, News Library, Courier-Journal File; Donna Webster, *Council Mulls Tighter Home-business Laws*, KNOXVILLE NEWS-SENTINEL, Sept. 26, 1999, at AC3, available in LEXIS, News Library, Knoxville News-Sentinel File; Josh Zimmer, *Home Jobs Ordinance Hits a New Problem*, ST. PETERSBURG TIMES, Apr. 13, 2000, at Citrus Times 1, available in LEXIS, News Library, St. Petersburg Times File.

local officials certainly should take into account when considering any reforms to the current zoning rules. But, they also make local legislators' jobs difficult. Assuming that they determine that the current rules are not working, instead of deciding that they should be more strictly enforced, these officials face the daunting task of crafting a home-business friendly zoning regime that also addresses residents' reasonable concerns about how home businesses may affect their lives and their neighborhoods.

How they should approach that task depends, in large part, on how one perceives the nature of the problem. One view might be that the current zoning restrictions basically represent a reasonable response to residents' legitimate concerns about home businesses. In this view, the zoning rules restricting home businesses simply are an institutionalized version of the "better safe than sorry" principle: they prohibit most home businesses in order to prevent an occasional "bad egg" from seriously disrupting her neighbors by working from home.²¹⁰ Thus, while the rules may impose high "prevention costs"²¹¹ that seriously disadvantage the millions of people who want or need to work at home and who would do so in a completely responsible manner, the common proscriptions—such as the preference for professional occupations over commercial enterprises, the prohibitions on hiring employees, selling and producing goods and services, and operating equipment—simply exclude those businesses that pose the greatest threat of generating negative externalities. Any problem, in other words, is not with the system, but only with its details. Unpredicted changes in the economy might lead modern legislatures to make slightly different *ex ante* calculations about which types of home businesses should be permitted than those made twenty or fifty years ago.²¹² But the rules need only minor tinkering at the edges—expanding the category of permitted home occupations slightly by, for example, permitting computer-based businesses and remote sales.²¹³

210. See, e.g., Ellickson, *supra* note 189, at 694 (arguing that "[t]he great danger . . . is not that the drafters of zoning ordinances will fail to eliminate nuisance costs, but that they will try to eliminate them all"); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 46-47 (1981) (noting that local officials frequently overvalue the nuisance costs when promulgating land use rules).

211. See Ellickson, *supra* note 189, at 694 (discussing the prevention costs of zoning).

212. See Kmiec, *supra* note 210, at 52 (noting that zoning is "incapable of assimilating rapid changes in design, technology, or community preferences").

213. See, e.g., Bennett, *supra* note 21, at 10 (quoting attorney for several Chicago-area

The difficulty with this “quick-fix” solution is that it does little to address the true root of the problem. The home-business dilemma arises not simply because zoning laws regulate home businesses in the wrong ways; it also arises because they regulate them for the wrong reasons. While the need to prevent nuisances has long been cited as a justification for zoning rules²¹⁴ (and zoning does serve that function), the zoning restrictions on home businesses, like all zoning rules, are not designed solely to prevent externalities. While this is hardly a novel observation,²¹⁵ the home-business dilemma vividly illustrates the fact that these rules are also about putting “everything in its place.”²¹⁶ Zoning designates that we are to reside in residential zones and work in commercial ones. The rules that prevent the mixing of the two activities—working and residing—do not reflect merely an overcautious calculation that the former may disrupt the latter (although it certainly might). They also embody a decision that the two activities are, by nature, incompatible; they do not belong together. Thus, zoning codes prefer professional occupations to commercial ones not simply because professionals are less likely to generate negative externalities—there is, for example, no reason to believe that a pediatrician’s office will generate less traffic than an insurance agent’s—but also because commerce corrupts residential neighborhoods. Similarly, zoning codes prohibit home businesses from hiring employees and from producing or selling goods not simply to keep traffic flow to a minimum, but because residential neighborhoods are not the places where people should work, or where products should be manufactured and sold.

Their actions alone demonstrate that millions of Americans are, for reasons of convenience or necessity, coming to reject the ideology behind zoning rules segregating work and home—namely, the belief that commerce is a corrupting influence on a wholesome home life. And, technological advances rapidly are undermining the nuisance-

municipalities: “We have businesses sprouting where they were never intended to be”).

214. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (citing nuisance prevention as justification for comprehensive zoning law); HOWARD LEE MCBAIN, *AMERICAN CITY PROGRESS AND THE LAW* 92-123 (1918) (arguing that zoning was needed to prevent nuisances in rapidly growing, unplanned cities).

215. See, e.g., JAMES METZENBAUM, *THE LAW OF ZONING* 21 (1930) (“The present zoning ordinances do not aim to prevent mere harmful uses, but on the contrary, they are comprehensive in that they concern all uses—good, bad and indifferent . . .”).

216. PERIN, *supra* note 20, at 116.

prevention justification for these rules as well. We are coming to believe that sometimes home and work should mix, that the strict segregation of the two "spheres" of human existence was either a mistake in the first instance or has outlived its usefulness. I do not mean to suggest, as the new urbanists might argue, that residential zones are themselves a bad idea. They may be, but as I have pointed out, many Americans apparently want to live in the types of neighborhoods that they create and preserve. My intent here is not to propose a radical restructuring of American land use law,²¹⁷ but only to suggest that the time has come for local legislators to consider redirecting one tiny piece to make the solution fit the problem: If disruptions caused by home businesses, rather than their existence per se, worry residents—and concerns raised in public debates indicate that this is the case—then the legal rules should not target the businesses themselves, but rather their potential for generating negative externalities. In other words, the ground rules should permit people to work at home so long as they do not unduly disrupt their neighbors by doing so.

Unfortunately, most of the communities that have tackled the issue thus far have not taken this approach. Most have attempted, as outlined above, to expand the category of permitted home businesses to include those least likely to generate externalities.²¹⁸ This possibility

217. Indeed, I doubt that a new urbanist-inspired referendum to abolish the exclusively residential zone altogether would be more successful than earlier proposals to replace zoning laws with other types of land use controls. See, e.g., FISCHEL, *supra* note 25, at 69-71 (arguing that zoning rights should be marketable); ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 173 (1977) (proposing creation of market in land use permits); SIEGAN, *supra* note 180 (arguing, based upon Houston experience, in favor of abolition government land use controls in favor of system of private covenants and nuisance law); Ellickson, *supra* note 189 (arguing for administrative nuisance system, supplemented by private covenants); Kmiec, *supra* note 210 (proposing to replace zoning with density-based system of land use controls); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980) (arguing in favor of replacing zoning with an adjudicative model of land use control that gives local officials the ability to review proposals for new projects on a case-by-case basis).

218. See Atwood, *supra* note 24, at 3B; Cline, *supra* note 24, at O28; Evans, *supra* note 24, at W3; *Money Issues Top 17-Article Rutland Warrant*, TELEGRAM & GAZETTE, (Worcester, Mass.), June 12, 1998, at B3, available in LEXIS, News Library, Telegram & Gazette File; *Rules for Business in Homes Ok'd*, *supra* note 24, at 2; Seibel, *supra* note 24, at Neighbors 2. Others have actually tightened restrictions on home businesses. See Webster, *supra* note 209, at AC3. But see *NH News Notes: Monfret Gains Seat*, UNION LEADER (Manchester, N.H.), May 13, 1998, at A4 (reporting that voters in Chester, New Hampshire approved all zoning changes except rules that would "clarify and tighten regulations governing home" businesses), available in LEXIS, News Library, Union Leader File.

is the least radical option, and one that may prove the only politically feasible alternative in some communities. But, such amendments will likely prove cosmetic. Local officials, faced with the daunting task of drawing bright lines between "good" and "bad" home businesses will be forced to continue relying upon certain "danger signs"—that a business accepts customer visits, employs outside individuals, or produces or sells a product—to predict which types of businesses might disrupt a neighborhood.²¹⁹ Some businesses that are prohibited under current law—for example, computer-oriented businesses that are "commercial" in nature—might be permitted. But the experience of a few jurisdictions that have addressed the home-business dilemma in this way illustrates that, for the most part, the new rules will look much like the current ones: blunt, inflexible, and unyielding to individual circumstances or variations among neighborhoods. Moreover, because of the economic and social factors discussed above, the cost of using inflexible zoning prohibitions to prevent the possibility of externalities generated by home businesses have become increasingly high.²²⁰

Finding a way to address residents' legitimate concerns about externalities without resorting to fixed categories of "good" and "bad" home businesses is, of course, no small task. One possibility would be to expand the use of special exceptions²²¹ or variances²²² to enable

219. See, e.g., Bennett, *supra* note 21, at 10 (discussing efforts to amend zoning rules in several cities).

220. See, e.g., FISCHEL, *supra* note 25, at 129-30 (arguing that zoning restrictions can result in community losses); Ellickson, *supra* note 189, at 695-97 (discussing "prevention costs" of zoning).

221. "Special exception" or "conditional use permit" provisions require landowners to secure administrative approval before using property in a way that is authorized by the zoning code. See, e.g., ANDERSON & YOUNG, *supra* note 18, §§ 21.01, 21.30; PLATT, *supra* note 25, at 245.

222. A "variance" is a limited administrative authorization to use property in a manner prohibited by the zoning code. See ANDERSON & YOUNG, *supra* note 18, §§ 20.02, 21.02. While, technically, variances are to be granted only in very limited circumstances in the interest of fairness and to ensure the constitutionality of certain zoning provisions, *see id.*, the empirical research suggests otherwise. See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 330-31 (2d ed. 2000) (collecting studies and noting that between 50 and 90% of landowners' requests for variances are granted); *see also* 5 NORMAN WILLIAMS, JR., AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER 1 (rev. ed. 1985) ("[I]t is common knowledge that zoning boards often ignore the restrictive tone [of state enabling acts], and sometimes tend to hand out variances just for the asking."); Joseph H. Bornong & Bradley R. Peyton, *Contemporary Studies Project: Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083, 1161 (1983) (stating that boards' reasons for granting variances "rarely satisfy the legal

officials to evaluate the potential impact of the proposed home businesses ex ante and to grant regulatory flexibility in appropriate cases.²²³ The experience of the handful of jurisdictions that have adopted this approach suggests that an expanded use of these preapproval processes permits a city to authorize a broader category of home businesses to operate than traditional zoning law recognizes. In Montgomery County, Maryland, for example, "major" home businesses must secure a special exception authorizing them to operate, and smaller home businesses are permitted to operate as a matter of right.²²⁴ Another variation on this theme would be to replace the current restrictions on home businesses with provisions requiring preapproval for "accessory uses" of residential property, and then require individuals seeking authorization to work from home to "make their case" for a variance or special exception authorizing them to do so.²²⁵ In crafting this preapproval process, legislators might draw upon the idea of "performance zoning," setting forth standards that the

requirements"); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 338-39 (1962) (blaming excessive variance grants for the "crass ugliness" of Lexington, Kentucky); Ronald M. Shapiro, *The Zoning Variance Power—Constructive In Theory, Destructive In Practice*, 29 MD. L. REV. 3, 9 (1969) (stating that the variance procedure's "safety valve" . . . has ruptured into a steady 'leak'").

223. For a proposal to replace most of zoning law—at least with respect to new development—with this type of adjudicatory preapproval process, see Krasnowiecki, *supra* note 217, at 749-52.

224. In Montgomery County, home occupations "with no impact"—defined as those that are visited by fewer than five vehicles per week, employ no nonresidents, and have "no discernable adverse neighborhood impact"—may operate as a matter of right. See MONTGOMERY COUNTY, MD, ZONING ORDINANCE § 59-A-6.1(b) (2000), available at http://www.amlegal.com/montgomery_county_md. Home occupations "with major impact"—those which have discernable impacts on traffic—are permitted but must obtain a special exception (renewable annually) from the board of zoning appeals. See *id.* § 59-G.229; see also Evans, *supra* note 24, at W3 (discussing Danville, Indiana zoning amendments that parallel the Montgomery County scheme).

225. Any proposal to expand the use of variances and special exceptions would be subject to the usual criticisms that an expanded use of "piecemeal" determinations undermine the legitimacy of land use controls. See *supra* note 222. But see Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 893-910 (1983) (defending the use of piecemeal planning devices). Using the special exception process, which does not require the board to depart from the technical terms of the zoning code in order to authorize the applicant to work from home, would minimize complaints about administrative abuses and ad hocery. This argument, however, can also be criticized. See MANDELKER, *supra* note 25, at 65 (arguing that special exceptions are equally subject to abuse as the variance processes).

resident must satisfy in order to secure permission to work from home: Perhaps she would have to present evidence that the proposed business could be operated without disrupting her neighbors, that the residential use of the property would remain the primary one, or that the business would not visibly alter the residential character of her neighborhood.²²⁶

Finally, some jurisdictions may choose to turn zoning prohibitions on their heads—to give residents the right to work from home, but penalize those who abuse the privilege of doing so. This alternative would require the development of an effective mechanism to police externalities as they arise, perhaps a quasi-nuisance-type adjudicatory process to consider neighbors' complaints about home businesses.²²⁷ In theory, the boards of zoning appeals, which are already in the business of making case-by-case determinations about the appropriateness of land uses, could perform this policing function. Instead of authorizing *ex ante* departures from zoning prohibitions, the boards could adjudicate complaints that the activities of a home business permitted by the zoning code have become overly disruptive to neighborhood life

226. "Performance zoning" proponents advocate replacing (or partially replacing) Euclidean-type use zones with a series of performance standards designed to avoid the spill-over effects (externalities) of competing land uses. A landowner may use her land in a number of ways, provided that she satisfies the requisite performance standards. For discussions of this model, see generally LANE KENDIG ET AL., *PERFORMANCE ZONING* (1980); DOUGLAS R. PORTER ET AL., *FLEXIBLE ZONING: HOW IT WORKS* (1988). Performance zoning is widely used to deal with industrial activities, but has gained some acceptance as a method of regulating nonindustrial uses. See JULIAN CONRAD JUERGENSMAYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 110-12 (1998). For a history of performance zoning, see Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 369-71 (1991).

227. Professor Robert Ellickson proposed such a system nearly three decades ago when he suggested that cities could establish "Nuisance Boards" empowered to promulgate and enforce norms of "unneighborliness" through a system of fines. Ellickson hypothesized that such an adjudicatory system would prove more efficient than traditional zoning prohibitions, at least when it came to regulating the "localized" externalities that home businesses are likely to generate. See Ellickson, *supra* note 189, at 761-79. In more recent years, a number of scholars have proposed using nuisance regimes to address a host of environmental and land use issues. See, e.g., Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403 (1997); Siobhan O'Keeffe, *Using Public Nuisance Law to Protect Wildlife*, 6 BUFF. ENVTL. L.J. 85 (1998); Omar Saleem, *Killing the Proverbial Two Birds With One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685 (1996); Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547 (1999).

and sanction the offending resident for abusing the privilege of working from home. While this alternative represents the most radical departure from existing zoning practice,²²⁸ it eliminates the uncertainty and likelihood of administrative error inherent in any system of ex ante regulatory review²²⁹ and has the added benefit of trusting residents to operate their businesses in a responsible, neighborly manner, which most undoubtedly would do.

CONCLUSION

Regardless of how local governments address the home-business dilemma, the evidence suggests that the path of least resistance thus far—doing nothing—will soon become an untenable one. In this Article, I have argued in favor of welcoming home businesses into residential neighborhoods. Local governments should undertake an honest reevaluation of the zoning rules restricting home-based businesses, rules that are based in part on a nearly 200-year-old presumption that “work” does not belong at “home.” Although there are good reasons to be concerned about introducing commerce into residential neighborhoods, the rules that govern its introduction should endeavor to maximize the opportunities to work from home, while addressing residents’ legitimate concerns about externalities that home businesses may create.

228. Most zoning codes give local officials the authority to sanction landowners for using their land in a way that is not permitted by the zoning code, rather than empowering them to address the negative externalities that arise from permitted uses of property. See ELLICKSON & BEEN, *supra* note 222, at 107-08.

229. See FISCHER, *supra* note 25, at 133 (discussing the transaction costs of public decision making about land uses); Ellickson, *supra* note 189, at 693-99 (discussing administrative costs of zoning); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and “Fine-Tuning” Regulatory Reforms*, 37 STAN. L. REV. 1267, 1314-31 (1985) (arguing that individualized variances impose high administrative costs).